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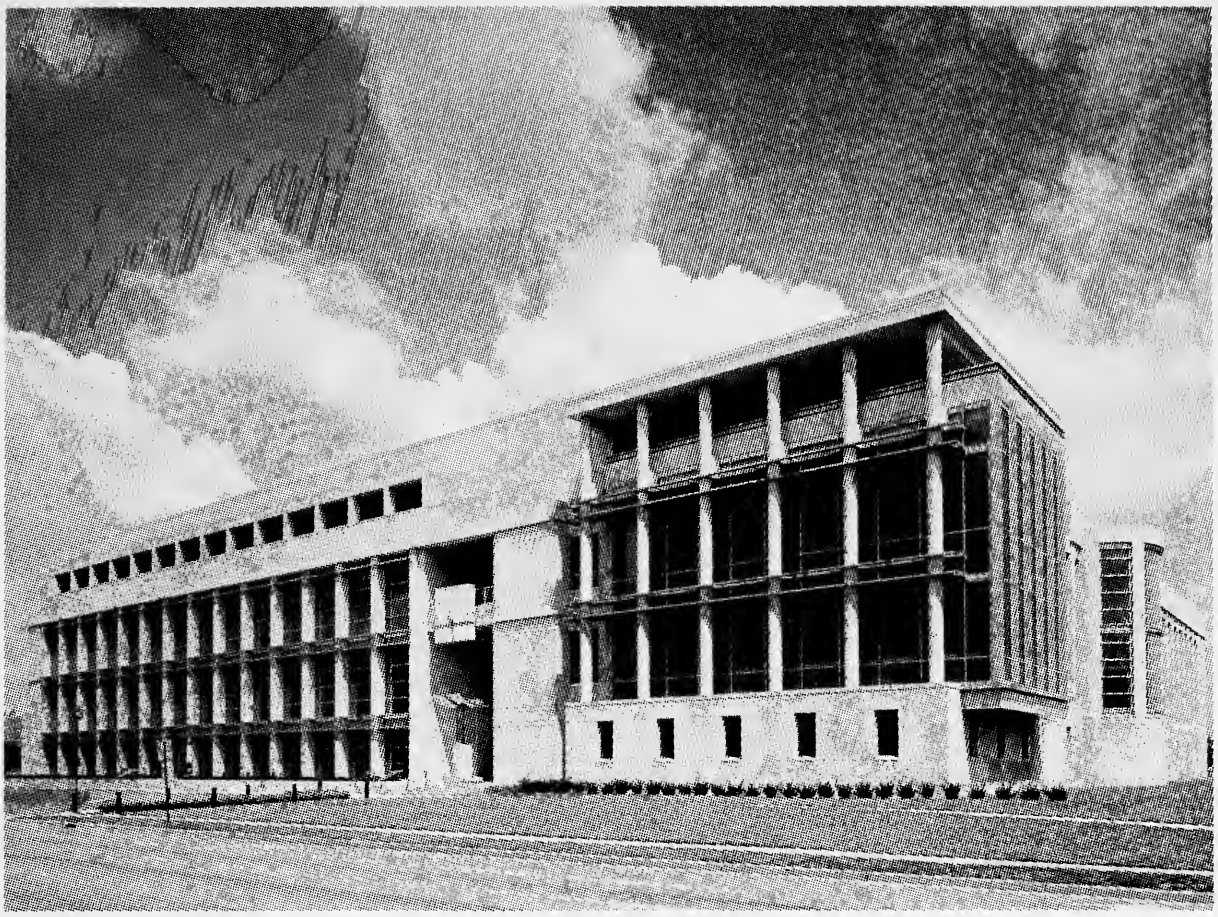

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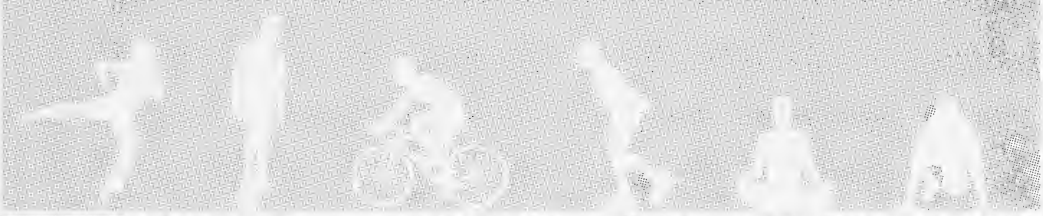

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2007 JAMES P. WHITE LECTURE ON LEGAL EDUCATION

INDIANA UNIVERSITY SCHOOL OF LAW—INDIANAPOLIS JAMES P. WHITE LECTURE ON LEGAL EDUCATION*

RUTH BADER GINSBURG**

I was touched by Professor White's request that I visit this law school as James Patrick White lecturer. No person has done more to advance the well being of legal education in the United States than Professor White. For twenty-six years, he was the American Bar Association's principal consultant on legal education, and he continues to aid the ABA's law school accreditation endeavors in an advisory capacity.

Professor White has shared his knowledge and experience with jurist seeking to promote quality legal education abroad. My husband and I had the pleasure of spending time with Professor White and his wife Anna in Barcelona in the summer of 2003, when all of us were participating in the fine program created in that captivating city by the University of Puerto Rico law faculty. I applaud Professor White's distinguished service to law schools, their faculties, staffs, and students, and anticipate that his sage counsel will continue to assist legal educators in the years ahead.

March is Women's History Month, so I thought it appropriate to speak in these preliminary remarks of two way paving women: Belva Ann Lockwood, first woman admitted to the Bar of the United States Supreme Court and first woman to argue before the Court; and Sandra Day O'Connor, first woman to serve as a Justice of the Court.

In March 1879, the *Evening Star*, a widely read Washington, D.C. newspaper, reported: "For the first time [ever], a woman's name now stands on the roll of [Supreme Court] practitioners." That woman, Belva Lockwood, was not born to social advantage. She grew up on a family farm in Niagara County, New York and, when widowed with a child at age twenty-two, she enrolled in college to gain the training she needed to become a teacher and, eventually, a school principal. She moved to D.C. in 1866, remarried, became a leading suffragist and lobbyist striving to open employment opportunities for women, and began pursuit of her long-held ambition to become a lawyer.

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* This is the text of the sixth James P. White Lecture on Legal Education delivered by the Honorable Ruth Bader Ginsburg at the Indiana University School of Law—Indianapolis on March 8, 2007.

** Associate Justice, Supreme Court of the United States.

Once compared to Shakespeare's Portia by her sister suffragist Elizabeth Cady Stanton, Lockwood resembled Shakespeare's character in this respect: Both were individuals of impressive intellect who demonstrated that women can hold their own as advocates for justice. Like Shakespeare's Portia, Lockwood used wit, ingenuity, and sheer force of will to unsettle society's conceptions of her sex. Portia, however, succeeded in her mission by impersonating a man. Lockwood, in contrast, used no disguise in tackling the prevailing notion that women and lawyering, no less politics, do not mix. Not only did she become the first woman admitted to the Bar of the Supreme Court, she ran twice for the office of President of the United States.

Her frontrunner status was achieved by persistent effort. In 1869, then a mother of two approaching her thirty-ninth birthday, Lockwood applied for admission to law school. Initially rejected on the ground that her presence "would be likely to distract the attention of the young men," she persevered until the National University Law School (now George Washington University Law School) allowed her to matriculate. She encountered yet another obstacle when that school refused to issue the diploma she had earned because men in the class resisted graduating with women. Ultimately she wrote to President Ulysses S. Grant, titular head of the University. She wasted no words: "I have passed through the curriculum of study . . . and demand my diploma." Grant did not answer, but two weeks later, in September 1873, the University's Chancellor awarded Lockwood her diploma.

Having practiced in the District of Columbia for three years, Lockwood qualified for admission to the U.S. Supreme Court in 1876, but Chief Justice Morrison R. Waite announced the Court's denial of her application with this explanation:

> By the uniform practice of the Court . . . and by the fair construction of its rules, none but men are permitted to appear before it as attorneys and counselors.

Undaunted, Lockwood relentlessly lobbied Congress to grant her plea. She succeeded in February 1879. Congress decreed that "any woman" possessing the necessary qualifications "shall, on motion, . . . be admitted to practice before the Supreme Court of the United States." Once a member herself, Lockwood moved the admission of Samuel R. Lowery, first African-American attorney from the South admitted to the Supreme Court bar.

Twenty-one months later, Lockwood became the first woman to participate in oral argument at the Court. She next and last argued before the Court in 1906. Then age seventy-five, with three decades of experience as a claims attorney, she helped to secure a multi-million dollar award for Cherokees who had suffered removal from their ancestral lands and relocation, without just compensation.

Lockwood was not content to rest on her personal achievements. She sought not only suffrage, but full political and civil rights for women. Though she could not vote for President, she ran for the office herself, pointing out that nothing in the Constitution barred a woman's eligibility. As she wrote in a letter to her future running mate, Marietta Stow: "We shall never have equal rights until we take them, nor respect until we command it." In 1884 and 1888, during her two

campaigns as the presidential nominee of the Equal Rights Party, Lockwood drew attention to a range of issues important to Americans. For example, she urged protection of public lands, called for reform of family law, and advocated use of tariff revenues to fund benefits for Civil War veterans. She used the publicity of the campaign to launch herself onto the paid lecture circuit, and to become an activist in the international peace movement and a leading proponent of international arbitration.

So much has changed for the better since Belva Lockwood's years in law practice. Admissions ceremonies at the Court nowadays include women in numbers. It is no longer unusual for women to represent both sides in the cases we hear. Women today serve as presidents of bar associations, federal judges, state court judges, and elected representatives on the local, state, and federal level. Still, the presence of only one woman on the current High Court bench indicates the need for women of Lockwood's sense and steel to see the changes she helped to inaugurate through to full fruition.

If you would like to learn more about Belva Lockwood, a biography is at last available. Just this year New York University Press has published a fine work by political scientist Jill Norgren, titled *Belva Lockwood: The Woman Who Would be President.*

I turn now to another woman of resilience, wit, and good humor who, like Belva Lockwood, has turned put downs and slights into opportunities, my dear colleague, Sandra Day O'Connor.

Collegiality is key to the effective operation of a multi-member bench. Sandra Day O'Connor, in my view, has done more to promote collegiality among the U.S. Supreme Court's members, and with our counterparts abroad, than any other of the now 110 Justices. Justice Breyer recently wrote of that quality: "Sandra has a special talent, perhaps a gene, for lighting up the room . . . she enters; for [restoring] good humor in the presence of strong disagreement; for [producing constructive] results; and for [reminding] those at odds today . . . that 'tomorrow is another day.'"

Of all the accolades Justice O'Connor has received, one strikes me as describing her best. Growing up on the Lazy B Ranch in Arizona, she could brand cattle, drive a tractor, fire a rifle with accuracy well before she reached her teens. One of the hands on the Ranch recalled his clear memory of Sandra Day: "She wasn't the rough and rugged type," he said, "but she worked well with us in the canyons—she held her own." Justice O'Connor did just that at every stage of her distinguished professional and devoted family life.

Her welcome when I became the junior Justice is revealing. The Court has customs and habits one cannot find in the official Rules. Justice O'Connor knew what it was like to learn the ropes on one's own. She told me what I needed to know when I came on board for the Court's 1993 Term—not in an intimidating dose, just enough to enable me to navigate safely my first days and weeks.

At the end of the October 1993 sitting, I eagerly awaited my first opinion assignment, expecting—in keeping with tradition—that the brand new Justice would be slated for an uncontroversial, unanimous opinion. When the list came round, I was dismayed. The Chief gave me an intricate, not at all easy, ERISA case, on which the Court had divided 6-3. (ERISA is the acronym for the

Employee Retirement Income Security Act, candidate for the most inscrutable legislation Congress ever passed.) I sought Justice O'Connor's advice. It was simple. "Just do it," she said, "and, if you can, circulate your draft opinion before he makes the next set of assignments. Otherwise, you will risk receiving another tedious case." That advice typifies Justice O'Connor's approach to all things. Waste no time on anger, regret, or resentment, just get the job done.

As first woman on the Supreme Court, Justice O'Connor set a pace I could scarcely match. To this day, my mail is filled with requests that run this way: Last year (or some years before) Justice O'Connor visited our campus or country, spoke at our bar or civic association, did this or that; next, words politely phrased, but to this effect—now it's your turn. My secretaries once imagined that Justice O'Connor had a secret twin sister appearing for her here and there. The reality is, she has an extraordinary ability to manage her time. Why does she travel to Des Moines, Belfast, Lithuania, Rwanda, Mongolia, when she might rather fly fish, ski, play tennis or golf? In her own words:

> For both men and women the first step in getting power is to become visible to others, and then to put on an impressive show. . . . As women achieve power, the barriers will fall. As society sees what women can do, as *women* see what women can do, there will be more women out there doing things, and we'll all be better off for it.

In the twelve and a half years we served together, Court watchers have seen that women speak in different voices, and hold different views, just as men do. Even so, some advocates, each Term, revealed that they had not fully adjusted to the presence of two women on the High Court bench. During oral argument, distinguished counsel—including a Harvard Law School professor and more than one Solicitor General—began his response to my question: "Well, Justice O'Connor . . . ." Sometimes when that happened, Sandra would smile and crisply remind counsel: "She's Justice Ginsburg. I'm Justice O'Connor." Anticipating just such confusion, in 1993, my first term as a member of the Court, the National Association of Women Judges had T-shirts made for us. Justice O'Connor's read, "I'm Sandra, not Ruth," mine, "I'm Ruth, not Sandra." (To my sorrow, I am now what Sandra was for her first 12 years of service on the Supreme Court, the lone woman.)

But Sandra remains close by. She has moved to chambers next to mine and maintains a tightly packed schedule. Among her current undertakings, Sandra is endeavoring to encourage all concerned with the health and welfare of our federal system to join forces to preserve the independence of the Judiciary from the political branches of Government, and the independence of judges from the partisan expectations of some who supported their appointment.

Finally, I will recall the surprise appearance Justice O'Connor made one night, some seasons ago, in the Shakespeare Theatre's production of Henry V. Playing the role that evening of Isabel, Queen of France, she spoke the famous line from the Treaty scene: "Hap'ly a woman's voice may do some good." Indeed it may, as Justice O'Connor has constantly demonstrated, and will no doubt continue to demonstrate, in all her endeavors.

QUESTION AND ANSWER SESSION WITH JUSTICE GINSBURG

Q. The Justice Department just released eight attorneys, federal attorneys, and all of them were under Bush's Justice Department. Can you comment on that . . . .

A. I have no better information about that than you do. U.S. Attorneys are presidential appointees; all the people let go were appointed by President Bush. Like you, as a concerned citizen, I'll follow explanations for the Department's actions in the news.

Q. Judge, it's nice to have you here, of course. Thank you for coming. I read recently that the number of women law clerks at the Supreme Court has begun to wane. I don't know if anybody is looking at the overall numbers when they choose law clerks, but maybe in retrospect you will look and see that there needs to be something corrective done. Is that an area you have noticed, an area in which you have taken special interest?

A. One could not help but notice. This year there are only seven women clerking for justices. Two of them are in my chambers. The year before there were seventeen. Even though the total number of law clerks at the Court is small (some 36), that's quite a drop. My colleagues, when the news came out, recognized that they had not thought about it. They will think about it now. I expect that the numbers next year will return to what they had been, somewhere in the fifteen to twenty range—not good enough, but a lot better than it once was.

No woman ever served as a law clerk at the Court until 1944, when Justice Douglas engaged the first. What prompted him to do so? World War II was underway, and men left universities for military service. The West Coast deans who chose Douglas' clerks, reported, "Sorry, we haven't any students who meet your standards." He wrote back, "When you say that, have you considered women? If there's one who is absolutely first rate, I might consider her." So, he hired Lucille Loman, who proved to be an excellent clerk. But then the war ended and the men came back. No second woman gained a clerkship at the Supreme Court until 1966. That year, Justice Black employed Margaret Corcoran. She had a significant boost in getting the job. Her father was a prominent Democrat, Thomas Corcoran, known around town as "Tommy the Cork." That filial relationship likely influenced Justice Black's decision to take her on board. Women didn't show up as law clerks at the Court in numbers until the 1970s, about the same time women's enrollment in law school began to spiral.

Q. In the case Rapanos v. United States, *Chief Justice Roberts expressed his desire to unify the court and do away with concurring and dissenting opinions. Do you think that is a good idea and if so, can it ever be achieved?*

A. Well, first, may I suggest that the Chief's expression was more modest. None of us would ever say the Court is doing away with separate opinions when we know that, in the next opinion to come out, the Court divided 5-4.

Our current Chief certainly has a good role model, the great Chief Justice John Marshall. He was either the third or fourth Chief Justice, depending on whether you count Rutledge who had a recess appointment, but was not confirmed by the Senate. Marshall's idea was that there should be one opinion

for the Court, and he promoted that idea in dealing with his colleagues. In those days, the Justices lived together in one boarding house or another when convening in D.C. They would have dinner, then Marshall would bring out his Madeira, serving it as they discussed the cases. He would say something like, "Well, we all agree, isn't that so," or "let me try to write an opinion that all of you can join." In the early days of his Court, remarkably, almost all the decisions were written by the Chief Justice. That's how he achieved unanimity. But then one of the Justices, Johnson, decided, all things considered, he didn't care much for boarding house fare. He preferred to live in his own quarters rather than with the brethren when they held Court in the Capital City. Another contributor to the break up of boarding house living was Joseph Story's wife, Sarah. She accompanied her husband at one Court session. Marshall worried about her presence. "It might be nice to have a woman at our dining table to add a note of grace," he said, but he hoped Sarah wouldn't occupy too much of her husband's time—the Court had serious work to do. One Justice after another left the boarding house to live alone or with his family. And as the boarding house life broke down, so did the Court's unanimity. Even Marshall, at the end of his long tenure as Chief, wrote a dissent or two. Marshall made a valiant effort.

As to the current Court—you will be better positioned to make a judgment at the end of the term now underway. Our Chief is making a point too often overlooked by the press. Last year, we were unanimous in forty-five percent of the decisions, fifty-five percent if you count only the bottom line judgment and not the separate writings. People tend to focus on the divisions, not on the unanimous decisions. We do try, when possible, to come together on a ground that all of us can accept. It may be a procedural ground, or interpretation of a statute in a way that avoids a divisive constitutional question. Candidly, I do not expect to see the day when our unanimity rate, routinely, is higher than forty percent. The forty-five percent we achieved last year was exceptional. Normally, the unanimity rate hovers around thirty-five percent.

Q. You spoke today about women who advanced civil rights in this nation. First, would you give the students here advice on how they can advance the civil rights of the citizens of this nation? And second, are there particular hot topics or problem issues you would like to see our students work on? Thank you.

A. I hope that every student who graduates from law school comes away from school with an appreciation that law is a learned profession, and that means that you don't simply do a day's work for a day's pay. It means you have a responsibility to use your skill and the monopoly you have in the law business to help make life a little better for the less fortunate people in your community. I think your esteem, your self-esteem, your sense of satisfaction will be bolstered if you know that you're not just turning over a buck, but giving back to the community.

I was an early proponent of clinical legal education. Every semester at Columbia, I taught one course and headed a clinic in which students worked with me on whatever cases I happened to be handling at the time. Nowadays, there are so many causes where the aid of lawyers would be useful. Among the cases that come to mind: death penalty cases; immigration cases, including, asylum cases; and many, many more. And still, unfortunately, cases involving

discrimination on the basis of race, national origin, and gender.

Q. Justice Ginsburg, this past November the State of Michigan's citizens voted to dismantle Affirmative Action in the selection program in the colleges. And looking at Grutter v. Bollinger, *and the new challenges growing across the nation in other states—looking at these types of issues on the election ballot, in addition to the new dialogue of the opponents challenging diversity, I'm curious as to how you see where we will end back in the courts on Affirmative Action programs, given the new challenges to using the term diversity?*

A. Affirmative Action was launched in a major way by President Nixon. People tend to forget that Affirmative Action became a big thing during his Administration. There was a start during Kennedy's Presidency, but it was Nixon's Department of Labor that devised the Philadelphia Plan. The notion was that unions were so strong in the construction trades, and there was rampant nepotism. It was thought that the only way to break the mold would be to set goals and timetables for the hiring and training of members of minority groups. Nixon approved. He believed it was better to have people at work than on welfare. His Administration inaugurated Affirmative Action programs, first in the construction trades.

The Office of Civil Rights at the then Department of Health, Education and Welfare played a large part. That Office spread Affirmative Action to most colleges and universities in the country. Affirmative Action clauses were contained in every government contract. The Civil Rights Office said to college and universities, "You have government contracts. If you want to keep them, you must set goals and timetables for the hiring of women and members of minority groups." Hardly anyone in those days questioned that that was a right and proper thing to do. It seems to me there is much misunderstanding today about Affirmative Action. I am not at all reticent about saying that I am the beneficiary of Affirmative Action. Justice O'Connor will tell you the same thing.

When I was appointed to the Columbia Law School Faculty in 1972, the president of the university was asked, "Well, how's Columbia doing with Affirmative Action?" The president responded, "It's no coincidence that the most recent appointees to the law school are a woman and a black man." I was asked what I thought of that comment. I replied, "It's no mistake that there has never been a woman teaching law in this two centuries old university, and never an African American man on the law faculty. Columbia is just making up for the talent and diversity lacking all these many years."

It is particularly hard to understand, after the Court's decision in *Grutter*, why people voted the way they did. Perhaps it's because they didn't understand what Affirmative Action truly means. I am comforted by this thought. A very wise man, my spouse, once said, "Instead of the bald eagle," which is printed on my speech box, "the symbol of the United States should be the pendulum." It takes caring people to do the right thing. You can't just sit back and say, "Oh, there's nothing we can do, the other side has geared up and is promoting anti-Affirmative Action referenda all over the country." It takes the will to fight back instead of wringing one's hands and complaining, "How sad all this is."

Q. In the case of Roper v. Simmons, *the Honorable Supreme Court had the occasion to refer to the Convention on the Rights of the Child, although it hasn't*

been ratified by the United States. My question is: If the occasion would present itself where the United States Supreme Court would have to decide on a certain women's issue, do you think the Supreme Court would look to the Convention on the Elimination of Discrimination Against Women ("CEDAW"), although it hasn't been ratified by the United States, doing so under the Roper v. Simmons *precedent.*

A. I wouldn't say it would be based on the *Roper* case. It would be based on more than 200 years of Supreme Court history. If you look back to the Supreme Court's early decision under the great Chief Justice Marshall, for example, it was not at all unusual to cite what they then called the Law of Nations, which today we call international law. Marshall said that international law is part of our law. And indeed it is. Even if we haven't signed onto CEDAW or some other U.N. Rights Conventions, we were instrumental in the very beginning in framing the U.N. Charter, and the U.N. Convention on Civil and Political Rights. Eleanor Roosevelt was a great proponent of international accords on matters of fundamental human rights.

I was surprised at all the attention the *Roper* decision got, because it cited a number of decisions of the European Court of Human Rights in Strasbourg. One reason, perhaps, why you don't see references to what other tribunals concerned with human rights are doing, is that U.S. lawyers, in their briefs, are not calling those developments to the attention of our Court. There is a large misunderstanding about referring to a decision from another country. That's comparative law as distinguished from international law, which is part of our law. A decision from abroad, of course, is never, never binding authority. But there are bright minds on courts all over the world. And it has just boggled my mind that there is no criticism at all about looking at any law review, referring even to a student note, but great consternation about citing a decision of the European Court of Human Rights.

The concern is a rather recent phenomenon. As a lawyer, I referred in briefs to U.N. Conventions and to decisions of other constitutional courts. In fact, I did so in the turning point gender discrimination case, decided by the Supreme Court in 1971, *Reed v. Reed.* That case involved an Idaho statute that provided: "As between persons equally entitled to administer a decedent's estate, males must be preferred to females." Just that simple. The plaintiff was a woman, Sally Reed, whose teenage son died under tragic circumstances, probably it was a suicide. Sally had custody of her son when he was "of tender years." But when the boy was into his teens, and the father applied for custody, the judge said, "He needs to be prepared for a man's world." So he allowed the father to share custody, which Sally always regarded as a great mistake. The boy died from a shot fired from one of his father's rifles. Sally wanted to be appointed administrator of his estate, which consisted of nothing but a few books, recordings, a guitar, some clothes, and a very small bank account. Her wish to serve as administrator certainly was not for economic reasons. Her former husband, perhaps out of spite, applied ten days later, and the Probate Court judge said, "I have no choice. The law says males must be preferred to females."

The Supreme Court, as of 1971, had never seen a gender classification it didn't like, or at least thought constitutional. I referred to two foreign decisions

in a rather long brief. Both were from the then West German Constitutional Court. One involved a provision of the German Civil Code that provided: When the parents disagree about the education of the child, father decides. The West German Constitutional Court held that provision incompatible with their new, their post-World War II Constitution, which recognized the equal citizenship stature of men and woman. The second case involved kind of a primogeniture for large farms. The rule was that the farm would not be broken up. The eldest son would inherit the whole. Never mind that the eldest son had three or more older sisters. That too was held unconstitutional under the new post-World War II Constitution. I put those decisions in the brief, never expecting that the Supreme Court would cite them, but in part for psychological effect. The message I tried to convey: If this is where the West German Constitutional Court is today, how far behind can the U.S. Supreme Court be?

We have much to teach based on our long experience with judicial review for constitutionality, but also much to learn from other democratic societies, from other good minds wrestling with problems similar to those we confront. For example, other countries are wrestling with the problem of how to maintain liberty in a time of threats to national security, a time of terror. Some have had the problem much longer than we have. We might look at the decisions of some of those countries. Israel is a prime example. Again, there is much misunderstanding of the utility and propriety of looking beyond our borders. Some say, if the Supreme Court refers to foreign decisions, it must think we ought to be governed by foreign powers. Far from it.

Another point I try to make on this subject. We were once about the only player in the judicial review for constitutionality league. In most of Europe, until World War II, the notion of parliamentary supremacy was so firm that it was unthinkable to let judges have the last word in interpreting the Constitution. But then the world witnessed what happened in Germany, what popularly elected legislators tolerated, even applauded. The Holocaust sparked the idea that perhaps a fundamental instrumental government—a constitution—ought to state rights that are inalienable, above the political fray, rights that can't easily be undone by a powerful leader or a compliant legislature. So, constitutions were framed and constitutional courts were created. Even our neighbor to the north, Canada, never had anything like judicial review for constitutionality until 1982 when that country adopted a Charter of Freedom and Rights. Today, the Canadian Supreme Court's jurisprudence on human rights is well regarded and cited by other courts. If we continue to have what some have called an "island mentality," if we think we have nothing to learn from others, we will stop being listened to. One question I'm regularly asked when I go abroad is: We have been so aided, inspired by the decisions of your Court, and we consult them often, but you never seem to be interested in what we do. I remain a proponent of looking beyond our borders. And several of my colleagues share the same view.

Q. Thank you very much for being here. It is really an honor. Oftentimes, you hear people commenting on the judicial system in this country and saying that the judiciary's role is not to be activists, and courts are taking too strong a position. What might you say to someone who complained of that issue to you?

A. Perhaps the most activist Court in the last century was the Court sitting in the early part of the Twentieth Century, up through the presidency of Franklin Delano Roosevelt. The members of that Court were sometimes called "The Nine Old Men." It was a Court known for striking down social and economic legislation right and left—mostly right. Roosevelt was beside himself when his efforts to help get us out of the Depression, to help people who were suffering mightily, were slapped down because the implementing legislation was inconsistent with freedom of contract. Laborers were required by their bosses to work ten, even twelve hours a day. What right did the government have to say that they could work only eight hours a day? That Court struck down state and federal laws with abandon if they violated the prevailing justices' notions of freedom of contract. But now the label "activist" has shifted to the other side. And when I reflect on this I can't help but conclude, what is a judicial activist? What is an activist court? It seems to depend on whose ox is being gored.

The truth is, that we all are tremendously attached to our craft. We know the difference between being a judge and being a legislator. But we also work with a fundamental instrument of government that has some grandly general clauses, like cruel and unusual punishment, like the equal protection of the laws or due process of law. The founding fathers included those clauses because they meant the grand principles embodied in them to govern through the ages, to serve society as it evolves over time.

Consider the Fourteenth Amendment, one of my favorites. The first time the equality principle is placed in the Constitution is in that post-Civil War amendment. It's not in the original Constitution. Nor shall any state "deny to any person the equal protection of the laws." Does that speak to the situation of women? The Fourteenth Amendment was adopted in 1868, long before women even had the right to vote, a time when they didn't sit on juries, and were restricted by the law in many other ways. So, am I an activist because I think the equal protection clause today encompasses people who were left out originally? One can take that idea, equal protection, and recognize its growth potential. Of course we recognize today that men and women are citizens of equal stature, they deserve equal rights and should bear equal responsibilities. The Constitution's grandly general clauses properly have been accorded a dynamic interpretation, to remain vibrant from generation to generation.

MODERATOR: I think maybe one more.

Q. Justice Ginsburg, the last response you had about the Lochner *case, it sort of raised a question that I always confronted in teaching constitutional law, which is basically, if it was wrong for the* Lochner *Court to reach the conclusion that it did, that libertarian interpretation of the Due Process Clause isn't constitutionally justified, how do you distinguish* Griswold*? What makes* Griswold *any different as a matter of constitutional law? I mean,* Lochner *was due process on the right;* Griswold *is due process on the center left, but how was* Griswold *and* Roe v. Wade *any different as a matter of the constitutional law that's been made?*

A. There may be a problem with the way those decisions were rationalized by the

opinion writers. The *Griswold* decision has roots in the Fourth Amendment. The fundamental idea is that government shouldn't be intruding into people's bedrooms. Government shouldn't be snooping into our private lives. That was the idea animating *Griswold.* It's a very old idea: My home is my castle. Motivating the Fourth Amendment was the notion that the government ought to let people alone. If I were a teacher I think I might not assign *Griswold.* I might assign, instead, Harlan's dissent in *Poe v. Ullman.* It should have been a majority opinion. It should have been the model for *Griswold.*

As for *Roe v. Wade*, I have written two articles observing that the decision was vulnerable from the day it was written, because it moved too far too fast, and it tied the decision to the wrong liberty guarantee. If you look at the Court's most recent decision, the *Casey* decision, you get much more of a sense that centrally involved is a woman's ability to determine her own life's course. There was much more of an equality dimension to *Casey* than one finds in *Roe v. Wade. Roe* was concerned as much about the freedom of doctors to practice their profession without government interference as about a woman's choice. The way I saw it, and the way I wrote about *Roe*, was this: The Court had before it the most extreme law in the nation, the Texas law that allowed no ground for abortion other than necessity to save the woman's life. No rape, incest, or health exceptions. The Court could have simply said: That most extreme law is unconstitutional. By doing so, the Court would have put its imprimatur on the side of change, which was already occurring all over the United States. The law was in flux. My home state, New York, and three others, made abortion accessible in the first trimester with no need to give any reasons. A number of states had adopted the ALI Model Penal Code grounds for permitting abortions. So the issue was very much in the political hopper. It was my view that if the Court had been more modest, there would have been continuing activity in the political arena to reform restrictive laws, and we might not be in the situation we are in today.

THE MODERATOR: Thank you very much.

Standing applause

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PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

From the State House to the Schoolhouse: Religious Expression in the Public Sphere

INTRODUCTION: MEGAPHONES AND DUCT TAPE: LEGAL TOOLS SHAPING RELIGIOUS EXPRESSION IN THE PUBLIC SPHERE

CYNTHIA A. BAKER*

The 2006 Program on Law and State Government Fellowship Symposium, *From the State House to the Schoolhouse: Religious Expression in the Public Sphere*, brought together a stellar faculty from around the state and nation to inform us about how laws, lawmakers, and citizens shape religious expression in the public square and in the public schoolhouse. The sixth fellowship event since the Program on Law and State Government's inception in 1997, the 2006 symposium and the articles in this issue emanating from that event embody the Program's mission of fostering the study and research of critical legal issues facing state governments.[1] A vital component of the Program on Law and State Government, the Fellowships offer an extracurricular academic opportunity for students interested in contributing to the contemporary scholarship of law and state government.[2] As the custodian of this Fellowship experience at this school,

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* Clinical Associate Professor of Law and Director, Program on Law and State Government, Indiana University School of Law—Indianapolis. B.A., *with distinction*, 1998, Valparaiso University; J.D., *magna cum laude,* 1991, Valparaiso University School of Law. The Program on Law and State Government thanks the Indiana Law Review for continuing the dialog between state governments and the academic community by including the symposium pieces in this issue. The Program on Law and State Government also thanks all of those who made scholarly contributions to the 2006 Symposium, especially those whose articles are published here. Finally, the Program on Law and State Government celebrates the work of the 2006 Fellows, Chris Campaniolo and Carrie Lynn.

1. The Program on Law and State Government Fellowship Symposium, *From the State House to the Schoolhouse: Religious Expression in the Public Sphere,* was held on September 29, 2006, in the Wynne Courtroom of Indiana University School of Law—Indianapolis.

2. Awarded on a competitive basis, the Program on Law and State Government Fellowships allow two students the opportunity to work together for one year exploring a topic of their choice concerning a critical legal issue facing state governments in exchange for tuition credits of up to $5000. Working under the guidance of the Director of the Program on Law and State Government, Fellowship responsibilities have included hosting an academic event, collaborating to write an

I laud the work, tenacity, and sincerity of the 2006 Program on Law and State Government Fellows, Mr. Chris Campaniolo and Ms. Carrie Lynn, in tackling this complex topic with such grace and integrity.

Religious expression, like poetry, art, law, and engineering, can encompass limitless variety and purpose. As Rabbis Sasso and Sasso of Indianapolis's Beth-El Zedek congregation have so eloquently expressed, religion can bring "an attitude of reverence and humility, a spirit of compassion, a fervor for justice, concern for rights and equality, care for the land, and respect for all."[3] However, as we know, religion is not without its social costs. As headlines from today's newspapers and a multitude of chapters from history books reveal, religious expression can divide and destroy communities at every political level. Jonathan Swift put it this way, "We have just enough religion to make us hate, but not enough to make us love one another."[4]

From the beginning of American history when "Puritanism . . . laid, without knowing it, the egg of democracy,"[5] religion and the practice of democracy have been closely intertwined. Our history is rich with the logistic, semantic, and very real conundrums of this fact. In 1789, Congress authorized paid chaplains three days before reaching final agreement on the Bill of Rights, which bars Congress's establishment of religion through law.[6] George Washington said in his farewell address to a country operating under the First Amendment, "Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports."[7] President Washington continued, "In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men & citizens."[8]

After all these years, the evidence suggests that we are, to put it mildly, divided as a country as to how we think and feel about these issues. A recent Pew Forum on Religion and Public Life report stated that 67% of Americans consider this country a Christian nation.[9] However, a Gallup poll from 1999 reported that over 50% of Americans cannot name the first book of the Bible and that 60% of Americans could not define the Holy Trinity.[10] The Pew poll also reported that

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academic paper on the Fellowship topic, or contributing to policy development and analysis at the state government level.

3. Dennis Sasso & Sandy Sasso, *What We Mean by the Role of Religion*, INDIANAPOLIS STAR, Sept. 5, 2006, at A6.

4. JONATHAN SWIFT, THOUGHTS ON VARIOUS SUBJECTS (1711), *reprinted in* MICELLANIES IN PROSE AND VERSE, VOL. 1, at 388 (Alexander Pettit ed., 2003).

5. JAMES RUSSELL LOWELL, NEW ENGLAND TWO CENTURIES AGO (1865), *reprinted in* AMONG MY BOOKS, VOL. 2, at 16 (AMS Press 1966) (1870).

6. Marsh v. Chambers, 463 U.S. 783, 786-88 (1983).

7. George Washington, Farewell Address to the People of the United States (Sept. 19, 1796), *available at* http://gwpapers.virginia.edu/documents/farewell/intro.html.

8. *Id.*

9. THE PEW FORUM ON RELIGION AND PUBLIC LIFE, *available at* http://pewforum.org/docs/indes.php?DocID=153 [hereinafter PEW FORUM].

10. George Gallup, Jr. & D. Michael Lindsay, SURVEYING THE RELIGIOUS LANDSCAPE:

almost half of Americans believe that Conservatives have gone too far in imposing their religious values; conversely, 70% believe that Liberals have gone too far in keeping religion out of government.[11] Currently, public debate and the ongoing litigation about the propriety and the merits of legislative prayer emanating from Indiana's State House highlight the deep divisions of understanding surrounding the fundamental legal concepts of religious expression and government speech.[12]

With these facts, it hardly comes as a surprise when teachers, citizens, and judges struggle with issues concerning how to create contours of religious expression in the public sphere that allow robust debate but do not marginalize or disenfranchise those holding a religious view that is not held by the majority. Understanding and interpreting controversial issues of public life must take into account that the borders between what is secular and what is sectarian may be perceived quite differently. From the vitriolic and sometimes violent controversies surrounding public schools' use of the Protestant Bible in the late nineteenth century[13] to more recent debates about whether public school curricula should reference historical dates with the Christian-based B.C. (Before Christ) and A.D. (*Anno Domini*, Latin for year of the Lord) instead of B.C.E. (before the common era) and C.E. (common era),[14] the starting points of the questions blur the boundaries of the answers.

For some the question is "how can we keep democracy safe from religion?"[15] For others, the question is "how can democracy survive without religion?"[16] The Fellowship symposium presented an opportunity to explore how we draw the

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TRENDS IN U.S. BELIEFS 49 (1999); *see also* Bill Broadway, *Are the Faithful Misinformed?*, WASH. POST, Aug. 5, 2000, at B9.

11. PEW FORUM, *supra* note 9, at 10.

12. *See* Motion for Stay, Hinrichs v. Bosma, Nos. 05-4604 & 05-4781 (7th Cir. Mar. 1, 2006) (Plaintiffs alleged the Indiana House of Representatives' practice of opening its proceedings with overtly sectarian prayer, usually Christian, violates the Establishment Clause of the First Amendment.).

13. *See generally* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 (2001); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

14. *See Stateline: B.C. or B.C.E.?*, STATE LEGISLATURES, Sept. 2006, at 11.

15. *See* ALAN WOLFE, THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH 253-55 (2003) ("There is, then, no reason to fear that the faithful are a threat to liberal democratic values. . . . the United States continues to honor religion publicly."); *see contra* CORNEL WEST, DEMOCRACY MATTERS 146 (2004) ("This Christian fundamentalism is exercising an undue influence over our government policies, both in the Middle East crisis and in the domestic sphere, and is violating fundamental principles enshrined in the Constitution . . . .").

16. *See* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 341 (1985); *see also* RICHARD NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984) (providing a critique of the political doctrine and practice that would exclude religion from the conduct of public business).

gossamer lines of religious expression in the public sphere as we travel between our concentric circles of communities to do our work, teach our children, and live our lives.

The 2006 Fellowship Symposium began with Program on Law and State Government Fellow Chris Campaniolo's remarks addressing states' expression of religion in the modern public sphere.[17] First, Mr. Campaniolo set the stage for the day's symposium by contrasting de Tocqueville's assertion that religion was "indispensable to the maintenance of republican institutions"[18] with Thomas Jefferson's understanding that the Establishment Clause of the First Amendment built "a wall of separation between church and state."[19] Then, drawing upon current events, contemporary scholarship, and state constitutional references to God and religion, Mr. Campaniolo urged us all toward "a more thorough understanding of an area of law that is as complex and nuanced" as the relationship between government and religion itself, and he encouraged "meaningful, respectful, thoughtful discussion" rather than debate.[20]

Next, Professor Douglas Laycock[21] shared remarks entitled, *Government Money, Government Speech, and the Establishment Clause in the Supreme Court.*[22] He began by pointing out that collectively "we still make forms of the Puritan Mistake."[23] Professor Laycock noted "both sides tend to think that all of the close questions should be resolved in their favor and all of the risk of judicial error should be put on the other side."[24] After giving a brief history of religious speech issues in America, Professor Laycock observed that two of the major issues in the courts and legislatures today, school funding and prayer in school, grew out of jurisprudence formed during the mid to late nineteenth century of American history.[25] Professor Laycock contrasted the "remarkable stability" of

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17. Christopher Campaniolo, States' Expressions of Religion in the Modern Public Sphere, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Campaniolo Address].

18. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1831).

19. Letter from Thomas Jefferson, to the Danbury Baptist Association (Jan. 1, 1802), *available at* http://www.stephenjaygould.org/ctrl/jefferson_dba.html.

20. Campaniolo Address, *supra* note 17.

21. Professor Laycock teaches at the University of Michigan School of Law.

22. Douglas Laycock, Government Money, Government Speech, and the Establishment Clause in the Supreme Court, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Laycock Address].

23. *Id.* Professor Laycock described the Puritan Mistake as the Puritans' belief that, although they came to America in search of religious liberty for themselves, if anyone else wanted religious liberty other than that of the Puritan variety, they had the liberty to live anywhere else in the world other than Massachusetts and that was "plenty liberty enough." *Id.*

24. *Id.*

25. *Id.*

current government sponsored religious speech jurisprudence with the "huge turnaround" in jurisprudence regarding religious funding, noting that the last time the U.S. Supreme Court struck down any sort of government financial aid to religious educational institutions or religious providers of social services was 1985.[26]

Premising his conclusion with the statement, "The goal of religious liberty is to preserve the liberty of every individual American to the greatest extent possible," Professor Laycock explored the fundamental differences between the prayer cases and the funding cases.[27] After contrasting the funding cases' individual choice ramifications with the collective choice aspects of the prayer cases, Professor Laycock briefly addressed the litigation before the Seventh Circuit arising from Indiana's House of Representatives.[28] Noting current case law holding that government-sponsored prayer not be too intensely sectarian, Professor Laycock suggested that those in support of Indiana legislative prayer invoking the name of Jesus Christ "have an uphill fight."[29]

Recognizing that the "idea of universal, free public education has long been a powerful force in American ideology,"[30] Fellow Carrie Lynn presented her scholarship about religious expression in public schools.[31] Ms. Lynn recognized the "challenges state governments and public school teachers face in determining the appropriate place for religion in the classroom,"[32] and surveyed common law decisions addressing the Free Exercise Clause of the First Amendment.[33] She then suggested guidance on how the topic of religion "can effectively be incorporated into a school's curriculum."[34] Noting the judicial directives to public school teachers that teaching "about religion is acceptable and even encouraged in public schools"[35] while "conveying a teacher's personal religious beliefs to a student would constitute state sponsorship of a particular religious belief system"[36] in violation of the Establishment Clause, Ms. Lynn urged the symposium audience to disregard the "stereotype that religion has no place in a

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Peter D. Enrich, *Race and Money, Courts and Schools: Tentative Lessons from Connecticut*, 36 IND. L. REV. 523, 523 (2003).

31. Carrie Lynn, Religious Expression in the Public Schools: An Ever-changing Dynamic, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Lynn Address].

32. *Id.*

33. *Id.*

34. *Id.*; *see* FIRST AMENDMENT CENTER, A TEACHER'S GUIDE TO RELIGION IN PUBLIC SCHOOLS, *available at* http://www.firstamendmentcenter.org/PDF/teachersguide.PDF.

35. Lynn Address, *supra* note 31.

36. *Id.*

public sphere such as a school."[37] She concluded her remarks with a quote from William James: "The process of education, taken in a large way, may be described as nothing but the process of acquiring ideas or conceptions, the best educated mind being the mind which has the largest stock of them, ready to meet the largest possible variety of the emergencies of life."[38]

The afternoon panel discussion, entitled *Religion in the Schoolhouse*, featured Professor Luke Meier,[39] Kevin McDowell,[40] and Ken Falk.[41] Moderated by Fellow Carrie Lynn, the panel addressed a variety of legal issues arising from the presence or absence of religion in public schools. Professor Meier started the panel discussion by pointing out that public education's efforts to inculcate moral values in our nation's children has, throughout history, depended upon religious teachings and texts. Professor Meier cited the Massachusetts Education Law of 1647, the Northwest Ordinance of 1787, and recent polls as examples demonstrating that a political majority of Americans have always supported religion as a vehicle to teach morality as a part of public education.

Professor Meier noted that the tensions created by the political and legal realities of such an entrenched societal value require creative solutions. He counted voucher programs, after school prayer clubs, and funding of religious resources in public school libraries as essential tools to address the concerns of the political majority, accommodate the voice of the political minority, and continue to strengthen a public school system envisioned by Horace Mann and Daniel Webster. In his article, *Using Agency Law to Determine the Boundaries of Free Speech and the Establishment Clause*,[42] Professor Meier suggests a framework for courts to assess these and many other creative solutions arising from religious expression in public schools.

Panelists Ken Falk and Kevin McDowell reminded symposium guests that case law has not quelled a variety of citizen concerns and questions about religious expression in public schools. Giving a variety of examples, Mr. Falk noted that school prayer issues, despite settled case law on the topic, remains a big part of his practice. Indiana's requirement that every public school day begin with a moment of silence, while clearly condoned by courts, continues to raise questions from parents and families subject to this requirement. Other issues faced with regularity include release time programs, treatment of creationism in the classroom, and, "the bane of the existence of any ACLU lawyer,"[43] winter

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37. *Id.*

38. WILLIAM JAMES, TALKS TO TEACHERS ON PSYCHOLOGY AND TO STUDENTS ON SOME OF LIFE'S IDEALS 145-46 (Dover Pub. 2001) (1899).

39. Professor Meier teaches for the University of Nebraska School of Law.

40. Mr. McDowell is General Counsel for the Indiana Department of Education.

41. Mr. Falk is Legal Director for the American Civil Liberties Union of Indiana.

42. Luke Meier, *Using Agency Law to Determine the Boundaries of the Free Speech and Establishment Clauses*, 40 IND. L. REV. 519 (2007).

43. Ken Falk, *Religion in the Schoolhouse*, panel discussion at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006).

holiday programs. Giving an update of current judicial treatment of issues such as school mascots and the celebration of Halloween, Kevin McDowell underscored the comments of Professor Meier and Ken Falk by stressing that accommodation and sensitivity are the keys to common sense solutions to such difficult issues. In *The Paradox of Inclusion by Exclusion: The Accommodation of Religion in Public Schools*,[44] Mr. McDowell shares a careful treatment of his insightful remarks with the readers of this volume.

Professor Thomas Berg[45] delivered the luncheon address, *State Governments and the Political Divisiveness of Religion*.[46] Professor Berg began his remarks by asking, "What is the proper general principle for interpreting the First Amendment's religious clauses?"[47] He noted that over sixty years of jurisprudential development has not yet led to a "consistent, satisfactory answer" to this question.[48] Professor Berg examined this overall question from what he described as the Breyer-Feldman approach of "minimizing religious division" and the scholarship encouraging governments to "offer greater latitude for religious speech and symbols in public debate, but also impose a stricter ban on state financing of religious institutions and activities."[49] Professor Berg then suggested that the avoidance of religious divisiveness should not be the guiding criteria in resolving these issues.[50]

Noting that allowing government funding of religiously integrated educational settings may contribute to a "net reduction in religious political divisiveness," Professor Berg quoted James Madison and George Washington in concluding that a judicially imposed "cure" or aim of reducing religious divisiveness may be worse than the "disease" of religious divisiveness in the first instance.[51] Rather, Professor Berg urged that the Supreme Court's current approach of respecting individual religious choice, in the school funding cases for example, serves as a better guiding principle.[52] Applying this conclusion to the legislative prayer case out of the Indiana House of Representatives,[53] Professor Berg suggested that the courts could give voice to the fundamental goal respecting individual religious choice by policing the process by which

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44. Kevin C. McDowell, *The Paradox of Inclusion by Exclusion: The Accommodation of Religion in the Public Schools*, 40 IND. L. REV. 499 (2007).

45. Professor Berg teaches for the University of St. Thomas School of Law (Minnesota).

46. Thomas Berg, State Governments and the "Political Divisiveness" of Religion, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Berg Address].

47. *Id.*

48. *Id.*

49. *Id.*; *see also* Noah Feldman, *A Church-State Solution*, N.Y. TIMES MAG., July 3, 2005, at 28.

50. Berg Address, *supra* note 46.

51. *Id.*

52. *Id.*

53. Hinrichs v. Bosma, Nos. 05-4604 & 05-4781 (7th Cir. Mar. 1, 2006).

individuals and different faiths are invited to offer legislative prayer rather than policing required non-sectarian language of each legislative prayer.[54]

The 2006 Fellowship Symposium gave participants the luxury of a few hours to ruminate about how the law gives the legal equivalents of both megaphones and duct tape to state governments, state government actors, and public school teachers in their respective roles in our public spheres. The law's efforts to give force and effect to the First Amendment of the U.S. Constitution and the states' efforts to allow meaningful religious expression as they carry out their work present difficult questions and even more difficult answers. To expect anyone, voter or legislator, to sterilize her public voice from her private faith, seems ludicrous to some and necessary to others. Whether it is a Christmas tree in the atrium of a public law school, a state government's recognition of Good Friday as a state holiday, or even the law's recognition of an "Act of God," it is my hope that the articles contained in this issue let us ask, answer, and, as Chris Campaniolo and Carrie Lynn suggested, to discuss with our fellow citizens these questions with empathy and understanding. Doing so is, and will be for the foreseeable future, an integral part of what is it to be an American.

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Director, Program on Law and State Government

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54. Berg Address, *supra* note 46.

THE PARADOX OF INCLUSION BY EXCLUSION: THE ACCOMMODATION OF RELIGION IN THE PUBLIC SCHOOLS

KEVIN C. MCDOWELL*

Government service provides unique opportunities, especially given the high rate of constituent contact such positions require.

I received a telephone call from a concerned citizen who was greatly troubled by what she perceived to be the efforts of her local public school district to undermine American ideals and usher in a "One World Government." At the core of her suspicions was the teaching of the metric system of weights and measures. The metric system, she asserted, is un-American. She knew that a meter was longer than a yard, but she did not understand the relationship of grams to pounds, liters to gallons, or centimeters to inches.

I attempted to reassure her that the metric system was not being foisted upon the young and unsuspecting minds of our children as a part of some international conspiracy. In fact, I advised, Congress authorized the use of the metric system in the United States in the nineteenth Century.[1]

Undeterred, she coolly responded, with the clarity of vision that only profound paranoia can provide: "If we convert to the metric system, have you thought about what that will do the length of the calendar year?" There is a certain degree of perverse logic in her *non sequitur*. Such curious illogic, however, is not reserved to political or social arenas: It is prevalent in the pitched battles waged over religion in the public schools. Although there are many facets to the disputes over the extent to which religion must or should be accommodated within a public school context, this article addresses only one observable phenomenon—Inclusion by Exclusion.

While the U.S. Constitution does not sanction government hostility towards religion,[2] there is a belief by some that public schools are increasingly hostile to one faith tradition—Christianity.[3] The government's position should be one of

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* General Counsel, Indiana Department of Education. This Article is based on remarks presented by the author on September 29, 2006, at the Fellowship Symposium "From the State House to the Schoolhouse: Religious Expression in the Public Sphere," sponsored by the Program on Law & State Government, Indiana University School of Law—Indianapolis.

1. The Metric Act of 1866 was enacted on July 28, 1866. It legally recognized the metric system of measurement. The law is currently codified at 15 U.S.C. §§ 204, 205 (2000). The Metric Conversion Act of 1975 (P.L. 94-168) designated the metric system as the preferred system of weights and measures for trade and commerce. Congress directed federal agencies, to the extent possible, to convert to the metric system. *See* 15 U.S.C. § 205a (2000).

2. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

3. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (upholding public school's actions in preventing a student from wearing a T-shirt with religious messages condemning homosexuality); Skoros v. New York City, 437 F.3d 1 (2d Cir. 2006) (affirming, in a 2-1 decision, judgment in favor of public school district holiday display policy that permitted the Jewish Menorah and the Islamic Star and Crescent but prohibited the Christian crèche); O.T. v. Frenchtown Elementary Sch. Dist. Bd. of Educ., 465 F. Supp. 2d 369 (D.N.J. 2006) (holding public

strict neutrality, neither aiding nor opposing religion. Those who believe public schools are hostile to Christianity also typically assert that the public schools actively promote either minority faith traditions or a "religion of secularism" that favors irreligion over religion.[4]

This perception of hostility has resulted in a type of hyper-vigilance whereby those who believe they are being excluded seek to ensure that all other "religions," secular or otherwise, are also excluded. Only through this exercise of dogmatic "cleansing" can the excluded class be once again included on an equal footing.

This paradoxical thinking does not appear to be organized or covert. It appears to be more reactionary. Nonetheless, the phenomenon is real. The following are examples of this phenomenon.

I. HALLOWEEN

In *Guyer v. School Board of Alachua County*,[5] the plaintiff removed his children from their elementary school on Halloween because he objected to the depiction of witches, cauldrons, brooms, and other traditional Halloween symbols.[6] The plaintiff asserted these symbols and other Halloween observations violated the Establishment Clause of the First Amendment[7] by promoting a religion known as "Wicca," which involves witchcraft.[8] The court noted that the school employed Halloween symbols in a secular, non-sectarian manner and there was no attempt to teach or promote Wicca, Satanism, witchcraft or any form of religion.[9] "[C]ostumes and decorations simply serve to make Halloween a fun day for the students and serve an educational purpose by enriching the educational background and cultural awareness of the students."[10] There was also a witch in the school cafeteria holding a wand with the caption, "What's cooking?"[11] The court found that Halloween "enhances a sense of community"

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school district was not justified in preventing second-grade student from singing "Awesome God" at a school-sponsored talent show opened to the public). Dissenting opinions in both *Skoros* and *Harper* raise interesting questions. The Supreme Court granted certiorari in the *Harper* case. Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007). However, the Court declined to hear the *Skoros* case. Skoros v. City of New York, 127 S. Ct. 1245 (2007).

4. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963) ("We agree of course that the State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe." (citation and internal punctuation omitted)).

5. 634 So. 2d 806 (Fla. Dist. Ct. App. 1994).

6. *Id.* at 806-07.

7. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

8. *Guyer*, 634 So. 2d at 806-07.

9. *Id.* at 807.

10. *Id.* at 807-08 (noting that witches appear in many mainstream literary contexts).

11. *Id.* at 807 n.1.

and is basically "fun."[12] There are no violations of the Establishment Clause merely because some adherents to a particular religion have adopted some of the same symbols associated with Halloween.[13] "Witches, cauldrons, and brooms in the context of a school Halloween celebration appear to be nothing more than a mere 'shadow,' if that, in the realm of establishment clause jurisprudence."[14]

II. MASCOTS

Native American mascots in professional and collegiate sports have not been the only source of controversy.[15] In *Kunselman v. Western Reserve Local School District*,[16] the circuit court upheld a federal district court's grant of summary judgment to the school district regarding a challenge by the plaintiffs to the school's use of a "Blue Devil" as a mascot.[17] The court found unreasonable the plaintiffs' assertion that the use of such a mascot promotes Satanism in violation of the Establishment Clause.[18] The "Blue Devil" mascot came from Duke University, which, in turn, borrowed the name from an elite corps of French alpine soldiers who fought in World War II wearing blue berets and going by the *nom du guerre* "Blue Devils."[19] The Circuit Court of Appeals, quoting the district court's decision, found the mascot's use was entirely secular and did not have the primary or principal effect of promoting Satanism.[20] Being personally offended does not create a constitutional violation.[21]

Additionally, in *West Virginia v. Berrill*,[22] the court upheld the defendant's convictions for disrupting a public meeting and wearing a mask.[23] Berrill, believing the school board did not take seriously his earlier concerns about the school district's use of a "red devil" as a mascot, disrupted a school board meeting by dressing in a devil costume and prancing around the room, frightening some children present.[24]

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12. *Id.* at 808.
13. *Id.* at 809.
14. *Id.*
15. *See, e.g.*, Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005) (involving a long-running dispute over the use of the term "redskin" by a professional football franchise); Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) (involving one of several controversies involving "Chief Illiniwek" at the University of Illinois).
16. 70 F.3d 931 (6th Cir. 1995).
17. *Id.* at 933.
18. *Id.* at 932.
19. *Id.*
20. *Id.* at 933.
21. *Id.* at 932-33.
22. 474 S.E.2d 508 (W. Va. 1996).
23. *Id.* at 510.
24. *Id.*

III. T-SHIRTS

In *Harper v. Poway Unified School District*,[25] the school district permitted the Gay-Straight Alliance to hold a "Day of Silence" at the school to heighten awareness of intolerance shown towards those of different sexual orientation.[26] The school had experienced conflict in the past over this issue and the use of the "Day of Silence."[27] On the "Day of Silence" scheduled for 2004, Harper–a sophomore at the time–wore a T-shirt expressing his religious objections to homosexuality and his general objection that the school had seemingly endorsed a practice that God had condemned.[28] His T-shirt contained Biblical references.[29] He was advised that his T-shirt created "a negative and hostile working environment for others," which violated the school's dress code.[30] Harper would not remove his T-shirt.[31] He remained in the administration office for the day.[32] He was not suspended or disciplined.[33] He later sued, asserting in part that the school's action violated the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment,[34] as well as Equal Protection and Due Process Clauses of the Fourteenth Amendment.[35]

The district court dismissed the Fourteenth Amendment claims and denied injunctive relief.[36] The Ninth Circuit affirmed the denial of the injunctive relief because it did not believe the student demonstrated a likelihood of success on his First Amendment claims.[37] The case demonstrates how divided the Ninth Circuit is on religious issues. One judge on the court sought rehearing en banc, which was denied.[38] But the resulting opinions concurring or dissenting were unusually pointed. The dissent believed the majority engaged in "viewpoint

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25. 445 F.3d 1166 (9th Cir. 2006), *vacated, remanded*, 127 S. Ct. 1484 (2007), *appeal dismissed as moot*, 2007 U.S. App. LEXIS 9234 (9th Cir. Apr. 23, 2007).

26. *Id.* at 1171.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1172.

33. *Id.*

34. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

35. *Harper*, 445 F.3d at 1273. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

36. *Harper*, 445 F.3d at 1173.

37. *Id.* at 1192.

38. Harper v. Poway Unified Sch. Dist., 455 F.3d 1052 (9th Cir. 2006).

discrimination."[39]

IV. EVOLUTION

In *Peloza v. Capistrano Unified School District*,[40] Peloza was a biology teacher who filed suit against his school district claiming his civil rights were violated by the school's actions requiring him to teach evolution and prohibiting him from discussing religious matters with students on school grounds.[41] He asserts that "evolutionism" is a "religious belief" and "not a valid scientific theory."[42] He refused to include the theory of evolution in his instruction because it is not "fact" and because it "occurred in the non-observable and non-recreatable past and hence . . . not subject to scientific observation."[43] The court found that adding "ism" to "evolution" doesn't "metamorphose 'evolution' into a religion."[44] Disagreeing with the teacher, the court did not find that he was required to teach the theory of evolution as fact nor did the court find that the theory of evolution denies the existence of a divine creator.[45] "To say red is green or black is white does not make it so."[46] Thus, the teaching of the theory of evolution is not the promotion of a religion.[47]

The court also found that the teacher's rights of free speech were not impermissibly violated by the school district's reprimands and restrictions regarding his proselytizing of students on school grounds.[48] The court acknowledged there was a restriction on his free speech rights, but such restrictions on public school teachers are justified where there is a compelling governmental interest in avoiding a constitutional violation.[49] "The school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech."[50] The court supported this finding by noting that Peloza, "whether . . . in the classroom or outside of it during contract time, . . . is not just any ordinary citizen. He is a teacher."[51] Because of his respected position, there is an increased likelihood that high school students will equate his views with those of the school.[52] Discussing his religious beliefs with students during school time on school grounds "would flunk all three parts of the test articulated in

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39. *Harper*, 445 F.3d at 1197 (Kozinski, J., dissenting).
40. 37 F.3d 517 (9th Cir. 1994).
41. *Id.* at 519.
42. *Id.*
43. *Id.* at 520.
44. *Id.* at 521.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 522.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

Lemon v. Kurtzman."[53]

V. CURRICULUM

In *Fleischfresser v. Directors of School District 200*,[54] the plaintiffs sought to prevent the elementary school from using the *Impressions* reading series as the main supplemental reading program in grades K-5, contending the series violated the First Amendment's Establishment Clause by promoting "wizards, sorcerers, giants and unspecified creatures with supernatural powers," thus indoctrinating children in anti-Christian values.[55] The Seventh Circuit upheld the district court's dismissal of the action through summary judgment for the school district. The Seventh Circuit reiterated that schools have broad discretion in selecting curriculum, and courts should only interfere where constitutional values are "directly and sharply implicate[d]."[56] In this case, the plaintiffs failed to demonstrate that any coherent "religion" was being promoted even accepting the argument that the reading series contained concepts found in "paganism and branches of witchcraft and satanism."[57] A K-5 reading series should serve to stimulate a child's imagination, intellect, and emotions. Expanding children's minds and developing their sense of creativity is not an "impermissible establishment of pagan religion."[58] Works cited by the court included C.S. Lewis, A.A. Milne, Dr. Suess, Ray Bradbury, L. Frank Baum, and Maurice Sendak.[59] The court also rejected the plaintiffs' assertions that stories with witches, goblins and Halloween violated the Establishment Clause, holding instead that Halloween is an "American tradition" and is a purely secular affair.[60] The court also noted that the reading series contains stories based upon Christian beliefs, but any "religious references are secondary, if not trivial" when the overall purpose of the reading series is considered.[61]

Similar to *Fleischfresser*, in *Brown v. Woodland Joint Unified School District*,[62] the plaintiffs attacked the *Impressions* reading series as violating the First Amendment's Establishment Clause by promoting "religion" while violating plaintiffs' right to free exercise of their own beliefs.[63] The plaintiffs challenged thirty-two of the selections, contending these selections promoted the religion of

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53. *Id.* (citation omitted); see *infra* Part VIII for a discussion of the *Lemon* test.

54. 15 F.3d 680 (7th Cir. 1994).

55. *Id.* at 683. *Impressions* is a series of fifty-nine books with approximately 10,000 literary selections reflecting a broad range of North American cultures and traditions.

56. *Id.* at 686.

57. *Id.* at 687.

58. *Id.* at 688.

59. *Id.*

60. *Id.* at 688 n.8.

61. *Id.* at 689.

62. 27 F.3d 1373 (9th Cir. 1994).

63. *Id.* at 1376.

"Wicca" (witchcraft).[64] The selections do refer to witches and some related classroom activities include pretending one is a witch or sorcerer and creating a poetic chant.[65] In affirming the district court's summary judgment in favor of the school district, the Ninth Circuit Court of Appeals viewed favorably the school district's review committee, which was established following complaints from parents.[66] The review committee included a Christian minister.[67] The review committee found no connection between the reading series and the occult.[68] Citing the Seventh Circuit, the court noted the *Impressions* reading series was developed to serve a secular purpose related to the education of elementary school children and was not designed to promote any religion, although certain selections involving faith traditions and folklore in America are a part of the series, including selections involving the Christian faith.[69] Coincidental resemblance to certain religious practices does not amount to a constitutional violation.[70] The court also rejected the plaintiffs' assertion that the challenged selections are designed "through the use of neuro-linguistic programming" to "foster and promote" a "magical world view that renders children susceptible to future control by occult groups" and make them "more likely to become involved in occult practices later in their lives."[71]

VI. HARRY POTTER

Fleischfresser and *Brown* were decided before the British boy-wizard Harry Potter appeared. *Counts v. Cedarville School District*[72] involved the boy-wizard Harry Potter, whose exploits at Hogwarts School of Witchcraft and Wizardry are central to the six published novels by J.K. Rowling and four feature films.

The *Harry Potter* series has been something of a publishing phenomenon, with hundreds of millions of copies published worldwide in sixty-three languages.[73] Not surprising, a number of public school libraries contain the books. Also not surprising, there are those who wish to ban or restrict access to the books because of a belief that the books promote unwholesome activities (magic spells, disrespect for authority, deceit) as well as pagan religions and Satanism.

Counts began when a parent expressed objections to her pastor regarding the presence of *Harry Potter* books in the school library.[74] Her pastor was also one

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64. *Id.*
65. *Id.*
66. *Id.* at 1384.
67. *Id.* at 1377.
68. *Id.*
69. *Id.* at 1381.
70. *Id.*
71. *Id.* at 1382.
72. 295 F. Supp. 2d 996 (W.D. Ark. 2003).
73. http://en.wikipedia.org/wiki/Harry_Potter (last visited June 8, 2007).
74. *Counts*, 295 F. Supp. at 1000-01.

of the five school board members.[75] She was notably concerned with *Harry Potter and the Sorcerer's Stone*.[76] A fifteen-member Library Committee was formed to review her request to have this book withdrawn from all students.[77] The Library Committee voted unanimously in favor of keeping the book in circulation without restriction.[78] The school board, however, voted 3-2 to restrict access to the *Harry Potter* books to those students who had a signed permission statement from their parents or guardians.[79] Of the three school board members who voted to restrict access, two had never read a *Harry Potter* book and the third had read only one (the aforementioned *Sorcerer's Stone*).[80] They did not believe the books contained any profanity, sexuality, obscenity, or perversion, nor did they express any concern the books had actually led to disruption in the school district.[81] They did believe the books "might promote disobedience and disrespect for authority," and they were concerned the books dealt with "witchcraft" and "the occult."[82] The pastor-member, who had read one of the books, testified that he believed the books would "create . . . anarchy" at the schools and that restriction was a "preventative measure" necessary "to prevent any signs that will come up like Columbine and Jonesboro."[83] The court stated the issue to be decided: "Does a school board's decision–to restrict access to library books only to those with parental permission–infringe upon the First Amendment rights of a student who has such permission?"[84]

The court noted that the restrictions placed on access to the *Harry Potter* books had a "stigmatizing effect" that constituted "a restriction on access."[85] Unless the school board could justify such restrictions, "they amount to impermissible infringements of First Amendment rights."[86]

The court cited to (and quoted extensively from) *Tinker v. Des Moines Independent Community School District*:[87]

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over

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75. *Id.* at 1001.

76. Ironically, the original title of this book (as released in the United Kingdom) was *Harry Potter and the Philosopher's Stone*. http://en.wikipedia.org/wiki/Harry_Potter_and_the_Philosophers_Stone (last visited June 8, 2007). Although this is a more direct reference to alchemy, the school patron was upset with the references to "witchcraft." *Counts*, 295 F. Supp. 2d at 1004.

77. This type of *ad hoc* committee approach was viewed with favor in *Brown*.

78. *Counts*, 295 F. Supp. 2d at 1001.

79. *Id.*

80. *Id.*

81. *Id.* at 1000-01.

82. *Id.* at 1002.

83. *Id.* at 1003.

84. *Id.* at 1001-02.

85. *Id.* at 1002.

86. *Id.*

87. 393 U.S. 503, 511 (1969).

> their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reason to regulate their speech, students are entitled to freedom of expression of their views.[88]

The restrictions, to be justified, must be necessary to avoid material and substantial interference with schoolwork or discipline.[89] The three board members, however, were not aware of

> any actual disobedience or disrespect that had flowed from a reading of the Harry Potter books. Their concerns are, therefore, speculative. Such speculative apprehensions of possible disturbance are not sufficient to justify the extreme sanction of restricting the free exercise of First Amendment rights in a public school library.[90]

The court was likewise not persuaded that the *Harry Potter* series promoted a "religion." All three members testified that they believed the series promoted "witchcraft religion," but one testified that if the books "promoted Christianity," he would not object to them.[91] Notwithstanding their personal distaste for "witchcraft religion," the court wrote, "it is not properly within their power and authority as members of defendant's school board to prevent the students at Cedarville from reading about it."[92] Accordingly, plaintiffs' Motion for Summary Judgment was granted. The school district was enjoined and directed to return the books to the library shelves without any restrictions.[93]

VII. GOOD FRIDAY AND CHRISTMAS

In *Cammack v. Waihee*,[94] a case involving Hawai'i's observance of Good Friday, the Ninth Circuit discussed the problem of "political divisiveness" where minority faith traditions or non-religious persons or entities militate for official

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88. *Counts*, 295 F. Supp. 2d at 1002-03.

89. *Id.* at 1003.

90. *Id.* at 1004.

91. *Id.*

92. *Id.* (citing Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (involving a school board sought to remove library books it considered, in part, to be anti-Christian and the court stated "In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'")).

93. *Id.* at 1005.

94. 932 F.2d 765 (9th Cir. 1991).

recognition of days or periods of time important to them.[95] Public schools find themselves between those who would sanitize the public schools of any religious studies or references and those who wish to use the public schools as a means to promote denominational and theological preference. While the latter circumstance has been well litigated, the "sanitization" cases have not. But it seems evident from U.S. Supreme Court decisions that any "relentless and all pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution" as evincing hostility towards religion, which is as much proscribed as endorsement.[96] The following two cases illustrate positive approaches to balancing the religious and cultural diversity of the American population while satisfying constitutional requirements.

In *Florey v. Sioux Falls District 49-5*,[97] in response to complaints that Christmastime assemblies were religious exercises, the school board established a broad-based committee of citizens to review the school district's practices in light of constitutional requirements.[98] The committee's eventual report to the school board delineated permissible school activity but also recommended a policy to promote understanding and tolerance of various faith traditions while remaining neutral toward religion and non-religion.[99] The school board adopted the policy, recognizing that one of the school district's goals "is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization."[100] To implement this policy, the school board arranged the school calendar so as not to conflict with religious observances and to incorporate "the teaching *about* and not *of* religion . . . in a factual, objective and respectful manner."[101] Religious themes in the arts, literature, history, music, and drama were permitted if "presented in a prudent and objective manner."[102] Religious symbols, such as a cross, a crescent, and a Star of David were "permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature."[103]

The district court refused to enjoin the implementation of the policy, and the Eighth Circuit Court of Appeals affirmed. The appellate court noted "[t]he close

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95. "Political divisiveness" has been raised in Establishment Clause cases as an argument that to permit the challenged activity to continue would provoke political battles and divide the community. The U.S. Supreme Court has not determined a constitutional infringement based upon "political divisiveness" alone but has required a showing of "a direct subsidy to religious schools or colleges" in order to warrant inquiry into "political divisiveness." Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

96. Lee v. Weisman, 505 U.S. 577, 589 (1992).

97. 619 F.2d 1311 (8th Cir. 1980).

98. *Id.* at 1313.

99. *Id.*

100. *Id.* at 1319.

101. *Id.* at 1320.

102. *Id.* at 1319.

103. *Id.* at 1319-20.

relationship between religion and American history and culture," and that "total separation [between church and state] is not possible in an absolute sense."[104] The court found the policy to be neutral and "not promulgated with the intent to serve a religious purpose."[105] Religious symbols were used only as teaching aids and resources and were displayed only temporarily.

> We view the thrust of these rules to be the advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.[106]

The Court likewise did not find that the primary effect was to advance or inhibit religion. "The First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited."[107] The study of religion, when objectively presented as part of a secular program of education, is not forbidden.[108] The court expanded upon the concept of "study" to mean not only classroom instruction but public performances as well (but not religious ceremonies).[109] The fact that some people may be affected by religious references in a secular course of study does not invalidate the inclusion of such references. "It would be literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents."[110] In addition, "[t]he public schools are not required to delete from the curriculum all materials that may offend any religious sensibility."[111]

Clever v. Cherry Hill Township Board of Education[112] is a case that involved school officials removing a Nativity display from a bulletin board in one of its elementary schools in December 1991.[113] This resulted in a significant brouhaha. The school board formed a "Seasonal Observance Committee," which, as in *Florey*, reported back to the school board with several recommendations for including cultural, ethnic, or religious themes in the school's educational programs.[114] The school board adopted the recommendations as policy and developed procedures to "foster mutual understanding and respect for the rights of all individuals regarding their beliefs, values, and customs."[115] The school

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104. *Id.* at 1313-14 (citation omitted).
105. *Id.* at 1314.
106. *Id.*
107. *Id.* at 1315 (emphasis added).
108. *Id.*
109. *Id.* at 1316.
110. *Id.* at 1317.
111. *Id.* at 1318.
112. 838 F. Supp. 929 (D.N.J. 1993).
113. *Id.* at 934.
114. *Id.*
115. *Id.* at 932.

board added: "Programs which teach about religion and its role in the social and historical development of civilization and in the social and political context of world events do not violate the religious neutrality of public schools. Schools may teach about but not promote religion."[116] Although the school board relied heavily upon *Florey*, it did not restrict its curricular objectives to holidays that had both religious and secular relevancy.[117] The school board broadened the use of religious symbols by including these in school calendars along with secular holidays.[118] Appropriate seasonal displays were also permitted, but were restricted to no more than ten days.[119]

> Cherry Hill's policy also mandates that the calendars be used in conjunction with a list of books and other resource materials available in the school library relating to holidays identified in the calendar. Teachers are provided with descriptions of each holiday to "be utilized by staff members as an educational resource throughout the school year.[120]

The school board's primary purpose was "to promote the educational goal of advancing student knowledge about our cultural, ethnic, and religious heritage and diversity."[121]

The federal district court, in granting summary judgment to the school board, found: (1) the context within which the religious and secular symbols are employed does not endorse any religion; (2) the displays are curriculum-related and are not permanent; (3) there is no "overt religious exercise" associated with the policy, and thus no religious coercion; (4) there is no denominational preference; (5) there is no denominational hostility; (6) the policy "has a genuine and demonstrable secular purpose"; (7) the "primary effect" of the policy does not endorse any particular religion nor favor religion over non-religion; and (8) the policy and its procedures do not "unduly entangle the government in state-church relationships."[122]

The court also observed:

> Religion is a pervasive and enduring human phenomenon which is an appropriate, if not desirable, subject of secular study. It is hard to imagine how such study can be undertaken without exposing students to the religious doctrines and symbols of others.
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> . . . .

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116. *Id.*
117. *Id.* at 934.
118. *Id.*
119. *Id.*
120. *Id.* at 933.
121. *Id.* at 934.
122. *Id.* at 939-40, 942.

> . . . We learn this lesson [mutual understanding, respect, and tolerance] not by being offended or threatened by the religious symbols of others, but by understanding the meaning of those symbols and why they have the capacity to inspire intense emotions. If our public schools cannot teach this mutual understanding and respect, it is hard to envision another societal institution that could do the job effectively.[123]

The court's decision is not only well written but included seven exhibits detailing the school board's policies, its procedures, its guidelines, a compilation of religious symbols, two calendar months from the school calendar, and explanatory text to guide teachers in explaining the symbols.[124]

VIII. THE STUDY OF ISLAM

The U.S. Supreme Court has not banned instruction concerning religion in public schools. In *School District of Abington Township v. Schempp*,[125] the Court noted that "it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization."[126]

This is often stated in more simplified terms: Public schools can teach *about* religion rather than *teach* religion. Crossing the line can result in litigation claiming the challenged practice violates the First Amendment's religion clauses. However the concept may be phrased, the social sensitivities of the times may result in litigation to prevent or challenge the teaching about certain faith traditions. The tragic events of September 11, 2001 and subsequent hostilities have made the teaching about Islam a sensitive matter. Not surprisingly, there has been litigation.

In *Eklund v. Byron Union School District*,[127] the plaintiffs challenged the middle school curriculum that involved the use of a role-playing game to teach seventh grade students about Islam.[128] Plaintiffs claimed the school's methods violated the Establishment Clause of the First Amendment.

The California State Board of Education required seventh grade world history classes to include a unit on Islamic history, culture, and religion.[129] There was an approved textbook–*Across the Centuries*–which the school district employed, but the teachers were encouraged to use other instructional methods they believed would enhance their students' understanding of the unit.[130] Some teachers used an interactive module called "Islam: A Simulation of Islamic History and Culture," which uses a variety of role-playing activities to engage students in

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123. *Id.* at 939.
124. *Id.* at 942-50.
125. 374 U.S. 203, 225 (1963).
126. *Id.*
127. No. C02-3004 PJH, 2003 U.S. Dist. LEXIS 27152 (N.D. Cal. 2003).
128. *Id.* at *2.
129. *Id.* at *3.
130. *Id.* at *3-4.

situations approximating the Five Pillars of Islam, the elements of faith in the Muslim religion.[131]

Students were encouraged but not required to choose a Muslim name to facilitate the role-playing.[132] For the first two Pillars of Islam, the teacher read Muslim prayers and portions of the Qur'an aloud in class.[133] Student groups recited a line from a Muslim prayer, such as "In the name of God, Most Gracious, Most Merciful" as they left class.[134] Students also made group posters.[135] Some banners had quotations from the Qur'an, both in Arabic and English, although this was not required.[136]

For the third and fourth Pillars, students were encouraged to give up things for a day, such as watching television or eating candy, to demonstrate the fasting associated with *Ramadan*.[137] Students were also encouraged to perform volunteer community service, mostly around the school, as a means of demonstrating the charity aspect of *Zakaat*.[138] In all, these four activities took about a week in the eight-week unit.[139]

For the fifth Pillar–*Hajj*, the pilgrimage to Mecca–the teacher had the students participate in a board game called "Race to Makkah."[140] Students used their knowledge of Islam to advance on the board, with the goal of the game to reach "Mecca."[141] Cards were used that expressed certain elements of the Muslim faith, with three categories to choose from ("trivia," "truth," or "fact").[142] The teacher indicated the statements were expressions of what Muslims believed and were not actual historical fact.[143] The teacher also permitted students to dress in Arabic garb for class presentations.[144]

As a part of the final, the teacher required the students to write an essay critiquing elements of Islamic culture, albeit with the following caveat: "BE CAREFUL HERE–if you do not have something positive to say, don't say anything!!!"[145] The final followed the events of September 11, 2001, and the

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131. *Id.* at *1-4. The Five Pillars of Islam are *Shahada* (profession of faith in God); *Salaat* (prayer five times a day); *Ramadan* (ritual fasting from dawn to dusk during the month of Ramadan); *Zakaat* (charity); and *Hajj* (pilgrimage to Mecca).

132. *Id.* at *6.

133. *Id.* at *7.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at *7-8.

138. *Id.* at *8.

139. *Id.* During the time of the events at issue, the tragic events of September 11, 2001 occurred. The class spent a week discussing the attacks in the context of world history. *Id.* at *5.

140. *Id.* at *8.

141. *Id.* at *8-9.

142. *Id.* at *9.

143. *Id.*

144. *Id.*

145. *Id.* at *10.

teacher was concerned the students might "express racist remarks" rather than attend to the objectives of the unit on Islam.[146]

Other world history units also used role-playing. Some units also addressed religious themes, such as the rise of Christianity after the fall of the Roman Empire and the role of Buddhism in Chinese culture.[147]

Although the plaintiffs' son had participated in the Islam module when he was in seventh grade, his sister was allowed to "opt out" of the unit at the parents' request.[148] The plaintiffs' daughter was provided an alternate assignment (the French Revolution) while the rest of the class participated in the Islam unit.[149]

The school moved for summary judgment. The federal district court judge noted that the Supreme Court has fashioned three separate but interrelated tests for analyzing Establishment Clause disputes:[150] the *Lemon* test,[151] the *Lynch* endorsement test,[152] and the *Lee* test.[153] The court also noted that "[a]s an initial matter, the Supreme Court has held that the public schools bear the responsibility of educating their students about the history and cultures of other countries, which often must include a discussion of religion as well."[154] "The history of man is inseparable from the history of religion."[155] The plaintiffs argued the role-playing games constituted the practice of Islam and the school district's use of the Islam simulation module constituted an impermissible endorsement of the Islam faith.[156]

Under the *Lee* test or "Coercion Test," the Establishment Clause is violated where a school coerces students into participating in religious activities. "Coercion" can include "subtle and indirect pressure, such as social pressure from

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146. *Id.*

147. *Id.* at *10-12.

148. *Id.* at *12.

149. *Id.* at *12-13.

150. *Id.* at *14-16.

151. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The government action at issue must (1) have a secular purpose; (2) not have the principal or primary effect of advancing or inhibiting religion; and (3) not foster excessive government entanglement with religion. *Id.* at 612.

152. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The *Lynch* endorsement is somewhat a clarification or refinement of the "excessive entanglement" prong of *Lemon*. Under the endorsement test, the question is whether the challenged practice "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*

153. Lee v. Weisman, 505 U.S. 577 (1992). This test is also known as the "coercion test." "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.* at 587.

154. Eklund v. Byron Union Sch. Dist., No. C02-3004 PJH, 2003 U.S. Dist. LEXIS 27152, at *19 (N.D. Cal. 2003).

155. *Id.* at *19-20 (quoting Engel v. Vitale, 370 U.S. 421, 434 (1962)).

156. *Id.* at *21.

peers to conform to school-set norms, . . . even if students are otherwise free to opt out of the unit."[157] The school district argued that, as a threshold matter, the Establishment Clause could not be violated because the role-playing activities at issue were not "religious" activities.[158]

The court found that an objective review of the circumstances led to the conclusion the students at the middle school "[c]annot be considered to have performed any actual religious activities in their seventh grade world history class."[159] The students did not perform the actual Five Pillars of Faith. They did not proclaim faith in one God or belief in Muhammad as His prophet, did not pray five times a day, did not fast for a month, did not make charitable donations, and did not travel to Mecca.[160] "Instead, the students participated in activities which, while analogous to those pillars of faith, were not actually the Islamic religious rites."[161] Role-playing activities do not constitute the actual practice of a religion and do not violate the Establishment Clause.[162] "In addition, there is no evidence that the students performed these classroom activities with any devotional or religious intent."[163] The subjective lack of spiritual intent demonstrates the activities in question could not objectively be considered "religious activity" for the purposes of *Lee*.[164]

The plaintiffs countered that should the court find the role-playing activities did not constitute a "religious activity," the module nonetheless had the effect of advancing or endorsing the Islam religion, failing both the *Lemon* and the *Lynch* tests.[165] The court agreed that the Islam module would be unconstitutional under both *Lemon* and *Lynch* should the role-playing activities have the primary effect of either endorsing or disapproving of any religion.[166]

> Upon an objective review of the situation at hand, the students would not reasonably have understood the module to have endorsed Islam over other religions merely because of the role-playing activities at issue. As a matter of law, "a practice's mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of endorsing religion." Thus, the mere fact that the Islam role-playing module involved approximations of Islamic religious acts is not sufficient to create an endorsement of the Islamic faith.[167]

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157. *Id.* (citing *Lee*, 505 U.S. at 592-94).

158. *Id.*

159. *Id.* at *22.

160. *Id.* at *23.

161. *Id.*

162. *Id.* at *24.

163. *Id.* at *25.

164. *Id.* at *26.

165. *Id.* at *27.

166. *Id.*

167. *Id.* at *29 (citation omitted) (quoting Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1381 (9th Cir. 1994) (holding role-playing witchcraft rituals not an endorsement of

A reasonable student could not have believed the activities constituted an endorsement of religion. Students at the middle school participated in a number of role-playing activities for purely educational reasons and were exposed to a number of different religions.[168] "Given these facts, an objective review of the activities in question does not result in a finding of an endorsement of Islam."[169] In addition, the use of the Islam module was motivated by a purely secular purpose: to instruct the students in world history regarding the history, culture, and religion of Islam.[170] "[E]ven quasi-religious role-play is permissible if it does not objectively endorse one religion over another."[171]

The judge was not swayed by the plaintiffs' claim that the banners violated the Establishment Clause, drawing an analogy to the display of the Ten Commandments. The court added that the display of the banners was not for the primary purpose of endorsing a religion,[172] as the display of the Ten Commandments was in *Stone v. Graham*.[173] The court was likewise not persuaded by the plaintiffs' objections to the "Race to Makkah" trivia game and its cards that quizzed students on information they had learned during the Islam module. Given the context in which the cards were used, an objective observer could not conclude the cards endorsed Islam.[174] In addition, the teacher's cautionary note prior to the final examination could not reasonably be construed as endorsement of Islam.[175] The school district was granted summary judgment.[176]

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. In a terse opinion, the Ninth Circuit summarily affirmed the decision of the federal district court judge.[177] On May 31, 2006, the Plaintiffs filed for a writ of certiorari with the U.S. Supreme Court. The Supreme Court denied the writ on October 2, 2006.[178]

Wiccan religion)).

168. *Id.* at *30.

169. *Id.*

170. *Id.*

171. *Id.* at *31.

172. *Id.*

173. 449 U.S. 39, 41 (1980).

174. *Eklund*, 2003 U.S. Dist. LEXIS 27152 at *33-36.

175. *Id.* at *36-37.

176. *Id.* at *42.

177. *See* Eklund v. Byron Union Sch. Dist., 154 Fed. Appx. 648 (9th Cir. 2005).

178. Eklund v. Byron Union Sch. Dist., 127 S. Ct. 86 (2006). For a similar post-secondary dispute, see *Yacovelli v. Moeser*, 324 F. Supp. 2d 760 (M.D.N.C. 2004) (granting the University of North Carolina at Chapel Hill's Motion to Dismiss the plaintiffs' complaint that the university's orientation program—which required incoming freshmen to read and discuss a book on Islam, with alternatives for those who objected to the exercise—violated the First Amendment's Free Exercise Clause).

IX. RECOMMENDATIONS

Describing a phenomenon is only a first step. It would be a mistake to dismiss the perception of anti-Christianity within the public schools as the opinions of fringe elements. As is evident in a number of the reported cases above—notably the dissenting opinions in the Ninth Circuit's *Harper* decision (T-shirt with religious messages describing homosexuality as sinful)—there are a number of judges who believe the balance has shifted such that public school policies militate against religious expression of students, especially Christian expression, in favor of a "religion of secularism," a type of hostility that should fun afoul of Supreme Court guidance.

The approaches by the school districts in *Brown v. Woodland Joint Unified School District*[179] (challenge to the *Impressions* reading series), *Counts v. Cedarville School District*[180] (Harry Potter), *Florey v. Sioux Falls District 49-5*[181] (incorporation of religious symbols in instruction as means of increasing student knowledge, appreciation, and respect for the role of religion and faith traditions), and *Clever v. Cherry Hill Township Board of Education*[182] (similar to *Florey*, with the development of a calendar and related library references that provided additional information on important religious and secular observances throughout the year)[183] involved representatives of the respective school communities who received and acted upon concerns and complaints from other community members. The committees were composed of a cross-section of the community and were thus representative.[184] The courts have looked favorably upon this approach because it creates a forum for those who believe themselves to be marginalized or disenfranchised with the opportunity to be heard.

A greater concern is with the evolution of Establishment Clause defense strategies, especially in attempts to justify restrictions on religious speech of students, including student symbolic speech. In addition to the "political divisiveness" argument addressed above, there is also an emerging defense strategy that would permit restriction on student speech so as to avoid potential Establishment Clause violations. Under this latter strategy, viewpoint discrimination by a governmental entity (i.e., a public school district) may be justified where necessary to avoid an Establishment Clause violation. The U.S. Supreme Court has not explicitly accepted this defense, although it did acknowledge its existence—without ruling on it—in *Good News Club v. Milford Central School*,[185] where the Court stated: "[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint

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179. 27 F.3d 1373 (9th Cir. 1994).
180. 295 F. Supp. 2d 996 (W.D. Ark. 2003).
181. 619 F.2d 1311 (8th Cir. 1980).
182. 838 F. Supp. 929 (D.N.J. 1993).
183. *Id.* at 933-34.
184. *Id.* at 932.
185. 533 U.S. 98, 112-13 (2001).

discrimination."[186]

Permitting a governmental entity to avoid addressing the accommodation of religion through viewpoint discrimination based on an alleged Establishment Clause violation would be a disservice to all public school constituents. Such a defense strategy, if successful, would do nothing to allay the concerns of those who perceive the public schools to be hostile to their faith tradition. It would, in fact, tend to reinforce this perception. The resolution of this phenomenon depends upon direct engagement, no matter how unpleasant this might be. To do otherwise would be to abandon the essential teaching function of our public schools.

186. *Id.* at 113.

USING AGENCY LAW TO DETERMINE THE BOUNDARIES OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES

LUKE MEIER*

One of the more perplexing constitutional issues the Supreme Court has recently addressed is the relationship between the Free Speech Clause and the Establishment Clause in cases involving the religious speech of students. *Widmar v. Vincent*[1] and *Santa Fe Independent School District v. Doe*[2] are two Supreme Court opinions representative of this issue. In *Santa Fe*, the Court considered an Establishment Clause challenge to a school district policy which "permitted" elected student speakers "to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[3] In order to determine whether the pre-game speech would be delivered, and by whom, a series of two elections were to be held by Santa Fe high school students.[4] The first election determined whether the "brief invocation and/or message" would be delivered before the football game.[5] If the students voted in favor of having a speech delivered, a second election would determine who would be responsible for delivering a speech of his or her choosing.[6] The Court upheld the Establishment Clause challenge to the school district policy, over a vigorous dissenting opinion penned by Justice Rehnquist.[7]

In *Widmar*, the Court entertained a challenge under the Free Speech Clause to a policy of the University of Missouri-Kansas City which prohibited the use of University buildings "for purposes of religious worship or religious teaching."[8] The Free Speech claimants were student members of the religious group "Cornerstone," who had been denied access to university facilities for purposes of holding their group meetings.[9] The Supreme Court determined that the university regulation was unconstitutional viewpoint discrimination against the religious speech of the student group and struck down the regulation under the Free Speech Clause.[10]

Cases involving the religious speech of students, of which *Widmar* and *Santa Fe* are representative, are perhaps so conceptually interesting because of the seeming tension in these cases between the values attributed by the Court to the Free Speech and Establishment Clauses. An expansive interpretation of the

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1. 454 U.S. 263 (1981).
2. 530 U.S. 290 (2000).
3. *Id.* at 298 n.6.
4. *See id.* at 297-98.
5. *See id.*
6. *See id.* at 298.
7. *See id.* at 317-18 (Rehnquist, J., dissenting).
8. Widmar v. Vincent, 454 U.S. 263, 265 (1981).
9. *See id.*
10. *See id.* at 265-74.

Establishment Clause would seem to preclude a university from allowing expressly religious speech and worship on university property, but the Court in *Widmar* required the university to allow this student speech under the Free Speech Clause. Conversely, a rigorous application of the Free Speech Clause would seemingly prohibit a school from denying an opportunity for an elected student speaker to address the assembled crowd before a football game simply because the speaker might choose to speak from a religious perspective, yet the Court in *Santa Fe* concluded that the Establishment Clause required the school to "silence" this student speech. Thus, student religious speech is in some circumstances protected by the Free Speech Clause or prohibited by the Establishment Clause. In fact, for these types of cases, there is seemingly very little space between the operation of these two Clauses. The Supreme Court has even alluded to the possibility that *both* Clauses might be applicable in some factual settings.[11] Thus, in performing a legal analysis of issues involving student religious speech, the most important issue seems to be resolving which of the two constitutional provisions is controlling.

Widmar, and to a lesser extent *Santa Fe*, answers the question of which clause is controlling by asking whether the school has created a limited public forum for the expression of speech. In *Widmar*, the Court determined that the university had created a public forum when it allowed registered student groups to use its facilities for the purposes of student meetings. Because a public forum had been created, preventing the Cornerstone group from using University facilities constituted unconstitutional discrimination against religious speech. In *Santa Fe*, the Court explained that the "pregame ceremony is not the type of forum discussed in [*Widmar* and other limited public forum cases.] The Santa Fe school officials simply do not evince either by policy or by practice, any intent to open the [pregame ceremony] to indiscriminate use, . . . by the student body generally."[12] This conclusion that the Santa Fe school district had obviously not intended to open up the pregame ceremony as a limited public forum informed the Court's decision that the Establishment Clause, rather than the Free Speech Clause, was controlling.

Answering the "which clause controls" question by asking whether the school created a limited public forum seems an unsatisfactory way for analyzing student religious speech questions. Indeed, the Court acknowledged the limited usefulness of this approach when it distinguished the student pregame speaker in *Santa Fe* from a "newly elected prom king or queen."[13] The Court seemed to be thinking of a situation in which an overtly religious student is elected prom king,

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11. *See, e.g.*, Rosenberger v. Univ. of Va., 515 U.S. 819, 838 (1995) ("We granted certiorari on this question: 'Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious.'").

12. *Santa Fe*, 530 U.S. at 303 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988) (internal quotations omitted)).

13. *See id.* at 305.

and then, pursuant to a school policy that allows the prom king to address the students at the award ceremony, the prom king engages in a speech with a religious message or perhaps a direct prayer. Because the Court distinguished that situation from the student-elected speaker in *Santa Fe*, it seems safe to conclude that the Court would determine that the Free Speech Clause would be controlling in the prom king situation. The prom king's speech would not violate the Establishment Clause and the Free Speech Clause would prohibit the school from attempting to silence the religious aspects of the prom king's speech.

Yet, despite the fact that the Free Speech Clause would control the prom king hypothetical, no one could seriously contend that the school had created a limited public forum for "'indiscriminate use' . . . by the student body generally."[14] The limited public forum analysis, then, seems a poor choice for determining which of the two clauses of the First Amendment is controlling. Another approach is needed.

The Supreme Court, in *Santa Fe* and in other cases, has referenced an approach which better addresses the conflict between the Free Speech and Establishment Clauses. Under this approach, the Court simply determines who the speaker is: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[15] Thus, if the speaker is the student, the speech is protected and the Free Speech Clause prevails, whereas if the speaker is the school, the Establishment Clause prevails. The Court in *Santa Fe* even seemed to acknowledge that the "Who is the speaker?" approach is preferable to the limited public forum approach when it stated the following: "A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause."[16] In this statement, the Court apparently concedes that the limited public forum question is relevant only because it might be illustrative of the controlling question, which is whether the speech is private student speech or government (school) speech.

If the dispositive question in these cases is ascertaining who exactly is the speaker, the next challenge becomes developing a cohesive analytical approach by which to answer this question. Agency law might be particularly helpful in this pursuit.[17] Agency law is specifically devoted to delineating the legal relationships and legal obligations between various parties.

In the student religious speech cases, the student is the actual one engaging in the physical act of speaking. In *Widmar*, it was students who were engaged in "prayer, hymns, Bible commentary, and discussion of religious views and

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14. *Id.* at 303.

15. *See id.* at 302 (quoting Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (opinion by Justice O'Connor)).

16. *Id.* at 303 n.13.

17. Or, instead, perhaps this idea is merely a desperate attempt by the author to find some cohesion and unity in a year that includes teaching Torts, Corporations, and Constitutional Law II.

experiences."[18] Similarly, the speech in question in *Santa Fe* was the proposed speech by the elected student before home football games.[19] Just because a student is the actual one to physically engage in the speech, however, is not necessarily determinative on the question of whether the speaker is the school or the student. Indeed, as an entity, the government can only act through agents representing the government. Viewed in this context, the question is simply a straightforward agency question as to whether the student is speaking on his or her behalf or as an agent of the government. The analysis that agency law has developed to approach these issues would thus seem particularly relevant to the analogous constitutional law issue.

Determining that the identity of the speaker is really a question of agency law and is a start in developing a systemic analytical approach to the problem. Of course, there are subtleties within agency law for determining when a "principal" (in this case, the school) can be liable to a third party (in this case, the Establishment Clause plaintiff) based on the action of an agent (in this case, the student religious speaker). Traditionally, there are two different approaches within agency law to determine the principal's liability. These two approaches depend on whether the plaintiff is making a claim in tort or contract.[20] Modern agency law is perhaps more nuanced in its approach to determining the liability of a principle to a third party for the conduct of an agent. The traditional tort/contract bipartite approach, however, remains instructive and worth exploring as a potential vehicle by which to better comprehend constitutional law cases involving student religious speech. First, however, it is perhaps best to start with an explanation of the two traditional approaches used within agency law to determine the liability of a principal to a third party based on conduct of the agent.

If a third party asserts a contract claim against a principal based on an agreement made between the third party and the agent, the third party must prove that the agent had either express actual authority, implied actual authority, or apparent authority to enter into a contract with the third party on behalf of the principal.[21] An agent has express actual authority when the principal specifically authorizes the conduct by the agent.[22] Thus, if an employee's job description in a contract includes ordering supplies for the business, the agent has express actual authority to make contracts on behalf of the principal for the purchase of supplies. An agent has implied actual authority (frequently called incidental authority) to partake in any conduct that is incidental to fulfilling the agent's express actual authority.[23] Thus, for instance, an agent's express authority to manage a store would include the incidental authority to order supplies for the store. If an agent has neither express nor implied actual authority to act on behalf of the principal,

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18. Widmar v. Vincent, 454 U.S. 263, 263 n.2 (1981).
19. *See Santa Fe*, 530 U.S. at 297-98.
20. *See* DAVID EPSTEIN ET AL., BUSINESS STRUCTURES 36-41 (2002).
21. *See id.* at 38; *see also* RESTATEMENT (SECOND) OF AGENCY § 26 (1958).
22. *See* EPSTEIN ET AL., *supra* note 20, at 38.
23. *See id.* at 39.

an agent can nevertheless bind the principal in contract if the agent had apparent authority. Under apparent authority, conduct by the principal leads the third party to reasonably believe that the agent had actual authority to bind the principal contractually.[24] Thus, if an employee does not have authority to purchase on behalf of the principal business, a decision by the principal business to honor previous purchases by the employee would create a reasonable impression by the supplier that the employee had actual authority to order supplies for the principal. If the principal subsequently refused to honor a purchase order made by the agent on the grounds that the agent had no authority to place orders for the principal, the principal would nevertheless be liable to the third party supplier based on the principal's conduct in honoring the previous purchases made by the agent with the third party supplier. The agent would have "apparent authority" to bind the principal, even if the agent had no actual authority to contract on behalf of the principal.

Determining when a principal is liable to a third party for the tortious conduct of an agent is somewhat less nuanced than the analysis for contract claims. A principal is liable for the torts of his or her agent when: (1) a master/servant, as opposed to an independent contractor, relationship exists, and (2) the agent's tortuous conduct is committed within the scope of the agency relationship.[25] The analysis should be familiar to most lawyers. Whether a master/servant relationship exists,[26] as opposed to an independent contractor relationship, depends on the principal's right to control the agent in the particulars of his or her performance.[27] If a principal can control the particulars of the agents work, a master/servant relationship exists and the principal can be liable for the torts committed by the agent in the course of the agency relationship.[28] Conversely, if the details of the task in question are left to the agent, with no right of the principal to control the agent's conduct, the relationship is one of an independent contractor, and the principal cannot be liable for the torts of the independent contractor.[29]

Modern agency law supplements the traditional bipartite approach in various ways. For instance, under the Restatement (Third) of Agency section 7.08, an "apparent authority" analysis is used to determine the liability of a principal for the torts "committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its

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24. *See id.*; *see also* RESTATEMENT (SECOND) OF AGENCY § 27 (1958).

25. *See* EPSTEIN ET AL., *supra* note 20, at 41; *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

26. Or, the more modern term: employer/employee relationship. EPSTEIN ET AL., *supra* note 20, at 41.

27. *See id.* at 40. The Restatement (Second) of Agency defines the master/servant relationship. An important ingredient is the degree of control that the master has over the servants' actions. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

28. *See* EPSTEIN ET AL., *supra* note 20, at 40.

29. *See id.*

commission."[30] In an attempt to provide a demonstration for this somewhat confusing language, the Restatement gives an illustration in which a retail salesperson agent makes false statements to a consumer to induce the customer to purchase goods.[31] Under this example, the Restatement concludes that the principal storeowner is liable to the customer because of the conduct by the principal creating an impression that the salesperson had apparent authority to act on behalf of the principal.[32] There are numerous ways in which to reach the conclusion that the principal store owner in that hypothetical would be liable to the customer (presumably for the difference in the value of the goods, as promised compared to the actual value of the goods). For our purposes, however, it is only necessary to note that the underlying theory by which the customer would seek recover under that hypothetical could just as easily be viewed as a "contractual" claim as a "tort claim." Thus, although section 7.08 of the Restatement speaks in terms of "apparent authority" and "liability for a tort committed by an agent,"[33] it seems that the traditional bipartite approach remains valid. Under this bipartite approach, when a third party seeks recover from a principal based in tort, the relevant analysis will be whether the principal exercises sufficient control over the agent and whether the agent was acting within the scope of the agency relationship. When the third party's recovery is based in contract, however, the relevant analysis will be whether the agent was actually authorized by the principal to engage in the conduct or whether the principal had created a reasonable impression with the third party that the agent was authorized to engage in the conduct.

As it turns out, the Supreme Court has borrowed from each of these two traditional agency approaches in adjudicating religious speech cases. In *Santa Fe*, for instance, the Court seemed, in certain portions of the opinion, to particularly emphasize the amount of control which the school, or perhaps the student body electorate, maintained over the student speaker: "[T]he school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message."[34] "The message is broadcast over the school's public address system, which remains subject to the control of school officials."[35]

> The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals

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30. RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006).
31. *See id.*, Illustration 1.
32. *See id.*
33. *See id.*
34. Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 (2000).
35. *Id.* at 307.

> and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.[36]

"For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause."[37] "One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control."[38]

In addition to the above tort liability analysis, however, the Court in *Santa Fe* also seemed to borrow from the contract liability analysis from agency law:

> In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." [Wallace v. Jaffree, 472 U.S. 38, 73 (1985)] (O'Connor, J., concurring in judgment); see also [Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995)] (O'Connor, J., concurring in part and concurring in judgment). Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.
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> The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school.[39]

By asking whether the "objective observer" would perceive the student speech as an endorsement of religion by the school, the Court is basically using the apparent authority analysis from agency law to determine when a principal can be bound in contract by the conduct of its agent. Under the apparent agency analysis, a principal is bound by the contract entered into on his or her behalf by the agent because of conduct taken by the principal which would lead a third party to believe that the agent has the authority to make the contract on behalf of the principal. In applying the "objective observer" analysis, the Court in *Santa Fe* similarly focused on the actions of the school which would lead the audience to believe that the student speaker had authority to speak on behalf of the school:

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36. *Id.* at 306.
37. *Id.* at 317 n.23.
38. *Id.* at 310.
39. *Id.* at 308.

> The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. . . . It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation.
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> ***
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> The delivery of such a message-over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer-is not properly characterized as "private" speech.[40]

Thus, even within the Supreme Court's analysis in the *Santa Fe* case, there are two different conceptual approaches used to determine whether the school or student would be the speaker were the elected student allowed to perform the pregame speech. In one approach, the Court focuses on the likely perception of those attending the football game. The approach in which the Court analyzes the Establishment Clause challenge by considering the likely message received by the audience has been advocated in particular by Justice O'Connor,[41] and not without criticism.[42] This approach is closely analogous to the agency approach for determining the liability of the principal when the third party is seeking recovery in contract. In the other approach, rather than focusing on the likely perception of the listeners, the Court concerns itself with the actual control which the school can assert over the student religious speaker. This analysis is closely analogous to the agency approach for determining the liability of a principal for the tortious conduct of the principal's agent.

The "control" and "objective observer" approaches will often produce the

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40. *Id.* at 307-08, 310.

41. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772-73 (1995) (O'Connor, J., concurring) ("[B]ecause it seeks to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community, the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." (citations and internal quotation marks omitted)).

42. *See, e.g.*, Alifair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1052 (2005) (criticizing the "reasonable observer" test).

same result. The more control that a school asserts, or is able to assert, over a student's speech, the more likely it is that an observer will consider the real speaker to be the school. Thus, the two tests do not appear to be diametrically opposed. However, it is possible to conceive of cases in which the control analysis might conclude that the student is the relevant speaker, while the "observer" analysis might conclude that the student is merely speaking on the government's behalf. Indeed, Justice O'Connor's "reasonable observer/endorsement" approach (loosely borrowed by Justice Stevens in *Santa Fe*) has been deemed worthy of criticism by conservatives who fear that the test will effectively allow a heckler's veto over religious speech by those most offended or sensitive to religious ideas.[43] It seems that there is enough of a difference between the "control" and "objective observer" approaches used simultaneously in *Santa Fe* that the Court might someday be forced to choose between these two approaches. Again, it appears that agency law might be helpful in making this determination. Determining whether the Establishment Clause claimant in student religious speech cases is more analogous to the tort or contract claimant in the agency context is a neutral approach in considering which test should be used. If the Establishment Clause claim is most analogous to a contract claim, the "objective observer" type of approach, in which the ultimate benchmark is the likely perception of the audience, is warranted. However, if the Establishment Clause claim is more analogous to a tort claim, the focus should not be on the perceived reaction of the audience but rather on the actual ability of the school to control the student speech within the course of their relationship.

On first analysis, it is tempting to find the contractual analogy most relevant. If government, and particularly written constitutions, are nothing more than a social contract by those in society, an Establishment Clause claim can be seen as a breach of this social contract. On closer inspection, however, this analogy is misplaced. Under the Locke social contract theory, the contract claim would be based on the United States Constitution and, more particularly, the Establishment Clause. The breach would be the conduct of the agent in breaking the contract on behalf of the principal. Under typical agency analysis, however, the relevant question is not whether the agent had the power to *break* the contract on behalf of the principal, but whether the agent had the power to *bind* the principal to a contract. The Locke analogy, thus, is incomplete.

The question is best answered by focusing on the difference in contract law and tort law regarding who provides the "rules" or "laws" which control. One of the fundamental tenets of contract law is that individual parties can supply the law that will determine the parameters of their relationship. If parties, through mutual agreement, can determine what conduct is expected of the other, the parties can rely on this agreed-upon conduct in conducting their affairs. The contracting parties supply the law that will govern their behavior towards each other. Tort

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43. *See* Doe v. Small, 964 F.2d 611, 730 (7th Cir. 1992) (Easterbrook, J., concurring) ("The Free Exercise Clause offers special protection for religious speech. If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum.").

law, however, functions in a different manner. Tort law provides the "rules" or law that will govern individual's behavior towards others in society in the absence of explicit agreements between the parties.[44] The plaintiff and defendant in an automobile accident are likely strangers who have never had a chance to determine the behavior expected towards each other; tort law thus fills this void by creating a body of law to apply to these situations. Often times, juries (applying vague legal standards such as "reasonableness" in a negligence claim) will supply the appropriate level of conduct between these two strangers. Other times, causes of action such as battery or assault will supply the relevant legal standard (such as the prohibition against intentionally causing harmful or offensive bodily contact, or the apprehension thereof). The critical factor is whether the parties supply the rules or law which control, or whether they are provided by the legal system.

Viewed in this context, it seems clear that the Establishment Clause claimant is most analogous to the tort claimant. Neither the school, the student religious speaker, nor the offended listener provided the rules which govern their situation. They are not contracting parties that can determine beforehand what type of speech will be permitted or prevented. Rather, the standard which governs is coming from outside this relationship, specifically, under the Establishment Clause. The Establishment Clause law or rule is supplied by the legal system, much like the battery cause of action or negligence standard are imposed on society participants. The parties cannot negotiate around this standard or reformulate it to "fit" the desires of the relevant parties, like they could do in a contractual relationship.

Because the Establishment Clause claimant is most analogous to the tort claimant, the "who is the speaker" question should be determined according to the agency rules applicable to tort claimants. Thus, the relevant questions are the "control" and "score of relationship" questions rather than the "objective observer" analysis. In future religious speech cases, the Court should answer the "who is the speaker" question by incorporating this analogous agency tort liability analysis.

Of course, neither the tort nor contract agency approach seems to be required under the Constitution. That is not the argument advanced in this Article. Rather, agency law seems to provide a useful conceptual approach to addressing these issues. The Court should not ignore this potentially valuable resource.

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44. Indeed, many aspects of tort law explicitly seek to limit the scope of tort liability to instances in which the parties are not able to negotiate the parameters of their relationship. For example, recovery under a negligence cause of action for pure economic damages is usually precluded.

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ARTICLE

ESTABLISHING THE PLEDGE: ON COERCION, ENDORSEMENT, AND THE *MARSH* WILD CARD

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INTRODUCTION

The constitutionality of the Pledge of Allegiance ("the Pledge") has recently received much attention in part because of a Ninth Circuit decision,[1] since reversed,[2] striking down a primary school policy respecting the recitation of the Pledge and in part because of a growing awareness that the Court's jurisprudence in this area is in great disarray. Add to this that two new Justices are now on the Court and it is no wonder that this area of law has been and will continue to be the focus of much debate.

Were the constitutionality of a primary school policy requiring recitation of the Pledge to come before the Court, at least two issues would be of great interest: (1) how that issue in particular would be resolved, and (2) how, if at all, Establishment Clause jurisprudence would be clarified. Predicting how the first issue would be resolved is more difficult to predict than might initially be thought. Various Justices have suggested in dicta that the Pledge passes constitutional muster, although they often were not addressing the specific issue of whether requiring recitation of the Pledge in a primary school violates First Amendment guarantees.[3] Arguably, such a policy fails to pass any of the tests that the Court has articulated for determining Establishment Clause violations, although Justice O'Connor has argued that a primary school Pledge policy need not violate the Endorsement Test[4] and Justice Kennedy dissented in *County of Allegheny v. American Civil Liberties Union*,[5] at least in part, because he believed that the majority decision would result in the Pledge being declared

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* Trustees Professor of Law, Capital University Law School. I would like to thank Professor Leslie Griffin for her helpful comments on an earlier version of this Article. I take sole responsibility for those errors that remain.

1. Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004).

2. *See* Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 5 (2004).

3. *See* Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 406 (4th Cir. 2005) (noting that numerous Justices have suggested in dicta that the Pledge is unconstitutional).

4. *See id.* at 33-45 (O'Connor, J., concurring).

5. 492 U.S. 573 (1989).

unconstitutional.[6] As a further complicating factor, the Court has been inconsistent even when applying the tests that it has announced, so it is difficult to predict with confidence what the Court would say were this issue to come before it.

The second issue of great interest is whether the Court would reaffirm the validity of any of the Establishment Clause tests already offered—the *Lemon* Test, the Endorsement Test, or the Coercion Test—or instead offer either a new test or a modified version of one of the existing tests. It is a testament to the utter confusion in this area of law that it is entirely unclear what the Court would do with respect to either the narrow question involving the constitutionality of such a school policy or the broader question involving the appropriate test for determining Establishment Clause violations.

Part I of this Article discusses the legal history of the Pledge, suggesting that an examination of the legal challenges to the Pledge before it included the words "under God" helps clarify the legal issues implicated in the challenges after that inclusion. Part II analyzes the various tests used to determine whether there has been an Establishment Clause violation, arguing that the recitation of the Pledge in primary or secondary schools violates the Establishment Clause in light of each of those tests. Notwithstanding that each of the tests would be violated by such a policy, however, the Article concludes that there is no way to predict with confidence what the Court will in fact say on this issue in particular or how, if at all, the Court will modify the existing jurisprudence. The only matters about which one can be confident are that the Justices will be divided, the opinion will be rancorous, and years of litigation will be required to help clarify the Court's evolving jurisprudence in this area.

I. THE HISTORY OF THE PLEDGE

The Pledge of Allegiance case law is much more involved than is usually appreciated, both because the Pledge did not contain the words "under God" for more than half a century and because the Pledge has been the subject of litigation for almost ninety years.[7] The relevant cases may be divided into two groups: (1) those challenging the constitutionality of a requirement mandating recitation of the Pledge even by those whose religious or political beliefs preclude such a recitation, and (2) those challenging the recitation of the Pledge in a particular setting, notwithstanding the existence of an exception for those who cannot recite it in good faith. The Court has held that the Constitution requires an exception for those who cannot recite the Pledge in good conscience[8] but has not yet

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6. *See id.* at 674 n.10 (Kennedy, J., dissenting).

7. *See infra* notes 11, 15 (The Pledge was adopted in New York in 1898 and in other states subsequently, but the Pledge did not include the words "under God" until 1954.); *see also* Troyer v. State, 29 Ohio Dec. 168 (Ohio Ct. Com. Pl. 1918) (involving prosecution of parent who required his child not to say the Pledge or salute the flag in school).

8. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that school children could not be forced to say the Pledge against their will).

addressed on the merits whether policies with such an exception may nonetheless violate constitutional guarantees.

A. The Early Pledge and Flag Salute Cases

The Pledge of Allegiance was written in 1892 by Francis Bellamy and James Upham in celebration of Columbus's discovery of America,[9] and was officially codified by the Congress in 1942.[10] The original Pledge did not contain the words "under God"—those words did not become part of the Pledge until 1954.[11] Several purposes were cited to justify amending the Pledge to include "under God," such as distinguishing the United States from the atheistic Soviet Union,[12] affirming that this is a religious country, and teaching children that the nation is under God.[13] By amending the Pledge in this way, it was thought that children might come to appreciate the spiritual values underlying this country, including the belief in an all-seeing, all-knowing, all-powerful Supreme Being.[14]

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9. John J. Concannon III, *The Pledge of Allegiance and the First Amendment*, 23 SUFFOLK U. L. REV. 1019, 1021 (1989) ("In 1892, Francis Bellamy and James B. Upham wrote the first Pledge of Allegiance to celebrate the quadricentennial of Columbus' discovery of America."); *see also* Carol McKay, *The Pledge of Allegiance's Long History of Controversy*, 49-AUG FED. LAW. 9, 9 (2002) ("The Pledge of Allegiance . . . began as a project of the National Education Association's celebration of Columbus Day.").

10. John E. Thompson, Note, *What's The Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 564 (2003) ("As codified by Congress in 1942, the Pledge of Allegiance read: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.'").

11. McKay, *supra* note 9, at 9 ("[T]he words 'under God' didn't show up until 1954.").

12. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 25-26 (2004) (Rehnquist, C.J., concurring in the judgment) ("The amendment's sponsor, Representative Rabaut, said its purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism."); *see also* Paul Andonian, Note, *One Nation, Without God?—A Note on the Ninth Circuit's Decision in* Newdow v. United States Congress *Holding that Reciting the Pledge of Allegiance in Public Schools Violates the Establishment Clause and Therefore Unconstitutional*, 33 SW. U. L. REV. 119, 120 (2003) ("[M]any argued that [the amendment to the Pledge] was specifically tailored to encourage children to recite the phrase in classrooms in order to advance a belief in God, as an attempt to distinguish the United States from the atheist beliefs of communist countries."); Linda P. McKenzie, Note, *The Pledge of Allegiance: One Nation Under God?*, 46 ARIZ. L. REV. 379, 410 (2004) ("Godless communism was perceived as the evil; the remedy that Congress devised was to instill a sense of moral superiority in U.S. citizens, based on a national ethic of monotheism.").

13. Thompson, *supra* note 10, at 564 ("According to the amendment's congressional sponsors, its purpose was to distinguish America from atheistic communism, affirm the nation as a religious one, and infuse children with the belief that the United States is under God.").

14. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2121 (1996) ("In floor speech after floor speech, Representatives and Senators asserted that American schoolchildren needed to be indoctrinated with the belief that America is a nation

Many states officially adopted the Pledge long before it was adopted by Congress.[15] Beginning as early as 1918,[16] state laws mandating recitation of the Pledge were challenged as a violation of the Constitution's freedom of religion guarantees,[17] even when the Pledge did not contain the words "under God."

In *Nicholls v. Mayor of Lynn*,[18] an eight-year-old was expelled from school for not participating in the Pledge of Allegiance ceremony at school.[19] The child and his father contended that saluting the flag and reciting the Pledge "constituted an act of adoring and of bowing down to the flag, which is contrary to the religious beliefs of the petitioner."[20] The Supreme Judicial Court of Massachusetts rejected that contention, suggesting that:

> The flag salute and pledge of allegiance here in question do not in any just sense relate to religion. They are not observances which are religious in nature. They do not concern the views of any one as to his Creator. They do not touch upon his relations with his Maker. They impose no obligations as to religious worship. They are wholly patriotic in design and purpose.[21]

The *Nicholls* court explained that the Pledge ceremony was "clearly designed to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the Constitutions of the State and nation."[22] Because

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under God. . . . Another Senator happily concurred: 'What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief, like that of their fathers and their fathers before them, in the all-present, all-knowing, all-seeing, all-powerful Creator.'").

15. *See* Charles J. Russo & Ralph D. Mawdsley, Commentary, *Trumped Again: The Supreme Court Reverses the Ninth Circuit and Upholds the Pledge of Allegiance*, 192 ED. LAW REP. 287, 288 (2004) ("An early sign of support for the Pledge occurred in 1898, the day after the United States declared war on Spain, when the New York State legislature passed the first statute requiring students to recite the Pledge. Similar laws were enacted in Rhode Island in 1901, Arizona in 1903, Kansas in 1917, and Maryland in 1918.").

16. *Id.* at 289 ("Religious opposition to the Pledge and flag salute, albeit absent the words 'under God,' appeared as early as 1918."); *see* Troyer v. State, 29 Ohio Dec. 168 (Ohio Ct. Com. Pl. 1918) (upholding on appeal a conviction for failing to cause one's child to attend school). The defendant told his daughter to go to school but had also instructed her not to salute the flag. *Id.* at *2. When the teacher would begin the day with the Pledge exercise, the child would then be sent out of the room by the teacher for failing to say the Pledge and salute the flag. *Id.* at *1. When the child would return to school after the noon hour, she would again refuse to salute the flag and would then be sent away. *Id.* The same sequence would occur day after day. *Id.*

17. *See* Russo & Mawdsley, *supra* note 15, at 289-90 (discussing "a flurry of judicial activity involving the Pledge and flag salute" in 1936-1939).

18. 7 N.E.2d 577, 578 (Mass. 1937).

19. *Id.* at 577-78.

20. *Id.* at 578.

21. *Id.* at 580.

22. *Id.* at 579.

there "is nothing in the salute or the pledge of allegiance which constitutes an act of idolatry, or which approaches to any religious observance," the court held that the "rule and the statute are well within the competency of legislative authority."[23] Rather than support religion, the salute and pledge "are directed to a justifiable end in the conduct of education in the public schools."[24] The court dismissed the petition for a writ of mandamus to reinstate the child in school.[25]

When examining the constitutionality of a local law requiring recitation of the Pledge in school, a New Jersey court in *Hering v. State Board of Education*[26] echoed the analysis of the *Nicholls* court. The *Hering* court suggested that "[t]he pledge of allegiance is, by no stretch of the imagination, a religious rite. It is a patriotic ceremony which the Legislature has the power to require of those attending schools established at public expense."[27] The court noted that a "child of school age is not required to attend the institutions maintained by the public, but is required to attend a suitable school."[28] Thus, the court suggested, parents have a choice with respect to the education of their children—they can pay for their children to get a private education or they can send their children to a public school. Parents choosing the latter must understand that their children will then have to participate in the Pledge ceremony. The *Hering* court bluntly stated, "Those who do not desire to conform with the commands of the statute can seek their schooling elsewhere."[29] However, that did not mean that parents could simply ignore their duty to educate their children, since a parent who did not provide private schooling and also did not have the child attend public school might be subject to criminal sanction.[30]

The same approach was followed in *Leoles v. Landers*.[31] Here, a twelve-year-old girl was precluded from attending Atlanta public schools,[32] because of her refusal to salute the flag.[33] She and her father explained that saluting the flag would violate their religious beliefs.[34] The *Leoles* court characterized "the use of the free public schools of this state and of the city of Atlanta [as] a privilege extended to the parents or guardians of children upon compliance with the reasonable regulations imposed by the proper school authorities."[35] Among the

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23. *Id.* at 580.

24. *Id.*

25. *Id.* at 581.

26. 189 A. 629 (N.J. 1937).

27. *See id.* at 629.

28. *Id.* at 629-30.

29. *Id.* at 630.

30. *See, e.g.*, Troyer v. State, 29 Ohio Dec. 168, 171 (Ohio Ct. Com. Pl. 1918) (upholding conviction of parent who did not adequately arrange for his child's schooling).

31. 192 S.E. 218 (Ga. 1937).

32. *See id.* at 219-20.

33. *See id.* at 220.

34. *Id.*

35. *Id.* at 221.

state's reasonable demands was the requirement to salute the flag.[36] Those who refuse can "attend a suitable private school."[37] However, because the requirement to salute the flag is "by no stretch of reasonable imagination 'a religious rite,'"[38] but merely "an act showing one's respect for the government, similar to arising to a standing position upon hearing the National Anthem being played,"[39] the state is not violating constitutional guarantees by requiring the flag salute.[40]

Gabrielli v. Knickerbocker[41] involved a nine-year-old girl who had been expelled from school in Sacramento, California, for consistently failing to salute the flag and say the Pledge of Allegiance.[42] She had been willing to stand quietly while others participated in the ceremony,[43] but that did not meet the local requirement.[44] The California Supreme Court held that patriotic and other civic duties "as may have reasonable relations to the maintenance of good order, safety and the public welfare of the nation, may not be interpreted as infringements of the religious freedom clauses of either the state or federal organic law."[45] The court reasoned that saluting the flag and pledging allegiance "tend to stimulate in the minds of youth in the formative period of life sentiments of lasting affection and respect for and unfaltering loyalty to our government and its institutions"[46] and cannot be characterized as an improper exercise of authority.[47] Like the *Nicholls* court, the *Gabrielli* court refused to have a writ of mandamus issued to reinstate the girl in school.[48]

In *State ex rel. Bleich v. Board of Public Instruction*,[49] the Florida Supreme

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36. *Id.* at 222.

37. *Id.* at 223.

38. *Id.* at 222.

39. *Id.*

40. *Id.* Interestingly, Dorothy Leoles did not refuse to pledge allegiance to the flag of the United States. *See id.* at 220 (noting that "she did not refuse to pledge allegiance to her country; she is a good and loyal citizen of the United States and of the City of Atlanta; she believes in the American form of government"); *see also id.* at 219-20 ("The respondents 'have inaugurated in the school system of the City of Atlanta an exercise or ceremony during which all pupils of the said schools are required to salute the United States flag.'").

41. 82 P.2d 391 (Cal. 1938).

42. *Id.*

43. *Id.* at 392.

44. *Id.* Some of the schools in Sacramento County would have permitted her not to participate, but the Sacramento City policy did not include an exemption for those refusing to participate for religious reasons.

45. *Id.* at 394.

46. *Id.*

47. *Id.* ("We see no violation of any article of the federal or state constitutions in its exercise of power in the instant case.").

48. *Id.* at 394.

49. 190 So. 815 (Fla. 1939).

Court rejected the argument that a flag salutation has any religious implications.[50] The court stated that "[s]aluting the flag is nothing more than a symbolic expression or a restatement of one's loyalty and fervor for his country and its political institutions. It is patriotism in action. It has no reference to or connection whatever with one's religious belief."[51] Indeed, the court sought to distinguish what was at issue in flag salutes from what was at issue in religious practices by noting that "[s]aluting the flag connotes a love and patriotic devotion to country while religious practice connotes a way of life, the brand of one's theology or his relation to God."[52]

Perhaps realizing that others (like the plaintiff) might not believe the distinction so clear, the Florida court explained that even if the flag salute does implicate religious practices, the state can nonetheless require such salutes.[53] The court noted, "Practices in the name of religion that are contrary to approved canons of morals or that are inimical to the public welfare, will not be permitted even though done in the name of religion,"[54] as if refusing to salute the flag for religious reasons would somehow endanger the public. Yet, even when seeming to countenance the possibility that sincere religious beliefs might preclude an individual from saying the Pledge or saluting the flag, the court then made clear that it could not take such a position seriously—"To symbolize the flag as a graven image and ascribe to the act of saluting it a species of idolatry is too vague and far fetched to be even tinctured with the flavor of reason."[55] Here, too, the *Bleich* court refused to issue a writ of mandamus to have the child reinstated in school.[56]

The difficulties posed for the Jehovah's Witness families in these cases[57] should not be underestimated. It may well not have been financially possible for the families to have sent their children to private school, so the parents might have been forced to choose between criminal sanction and having their children salute the flag. This was made explicit in *Johnson v. Deerfield*,[58] where the father explained that he was "not financially able to provide education at a private school, or furnish tutors, or obtain for [his children] equivalent instruction elsewhere than at a public school."[59] Given that he could not educate his children

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50. *Id.* at 816.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 817.

57. In almost all of the cases discussed here, the plaintiffs were Jehovah's Witnesses. *See* Johnson v. Deerfield, 25 F. Supp. 918, 919 (D. Mass. 1939); Gabrielli v. Knickerbocker, 82 P.2d 391, 392 (Cal. 1938); *Bleich*, 190 So. at 816; Leoles v. Landers, 192 S.E. 218, 220 (Ga. 1937); Nicholls v. Mayor of Lynn, 7 N.E.2d 577, 580 (Mass. 1937). In *Troyer*, the plaintiff was a Mennonite. *See* Troyer v. State, 29 Ohio Dec. 168, 169 (Ohio Ct. Com. Pl. 1918).

58. 25 F. Supp. 918 (D. Mass. 1939).

59. *Id.* at 919.

privately and that the state required that his children receive an education,[60] the Flag Salute law put him in the impossible position of having to violate either his legal or his religious duty. The federal district court in Massachusetts hearing the case rejected the argument that the father had been put in an untenable position.[61] Instead, the court reiterated what had previously been stated by different state courts, namely, that "obedience to the statute in no conceivable sense could be construed as a 'religious rite.' It involved no more than an expression of due respect for the institutions and ideals of the country in which the plaintiffs lived."[62]

In these cases, the courts tended to challenge the reasonableness rather than the sincerity of the belief.[63] Arguably, the courts should have been confining themselves to judging whether the defendant sincerely held the belief at issue, since the court would otherwise be putting itself in a position for which it was ill-suited, namely, judging which religious beliefs themselves are true.[64] In *Johnson*, the plaintiff claimed that it was not for the court to say whether the belief was reasonable but merely to decide whether the belief was sincerely held.[65] The

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60. *See id.*; *cf.* Sheldon v. Fannin, 221 F. Supp. 766, 768 (D. Ariz. 1963) (The plaintiffs "have not the financial means to obtain an adequate education otherwise than in the public schools of the State.").

61. *Johnson*, 25 F. Supp. at 919.

62. *Id.* (citing *Leoles*, 192 S.E. 218; Hering v. State Bd. of Educ., 189 A. 629 (N.J. 1937)); *see also* People v. Sandstrom, 279 N.Y. 523, 529 (N.Y. 1939) ("Saluting the flag in no sense is an act of worship or a species of idolatry, nor does it constitute any approach to a religious observance. The flag has nothing to do with religion . . . .").

63. *See, e.g.*, Gabrielli v. Knickerbocker, 85 P.2d 391, 392 (Cal. 1938) ("There is no suggestion that petitioner's objections are not made in good faith."); State *ex rel.* Bleich v. Bd. of Pub. Instruction, 190 So. 815, 817 (Fla. 1939) (Buford, J., dissenting to denial of petition of rehearing) ("[W]e should not by law require one to affirmatively engage in an act, not essential to the public welfare or the support of the government, which he or she conscientiously believes to be contrary to his or her religious tenets."); Nicholls v. Mayor of Lynn, 7 N.E.2d 577, 580 (Mass. 1937) ("It is assumed that the statement of beliefs of the petitioner made by him is genuine and true and constitutes the ground of his conduct.").

64. *Cf.* United States v. Ballard, 322 U.S. 78, 87 (1944).

> [The Fathers of the Constitution] fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id.

65. *Johnson*, 25 F. Supp. at 920 ("Much is made of the argument that the question whether the statute commands an act of patriotic loyalty or an act of religious worship is one upon which the courts have no right to pass. The plaintiffs say that if they honestly and conscientiously believe

court rejected that argument, instead suggesting that the flag salute could not reasonably be thought a religious rite.[66]

In *Minersville School District v. Gobitis*,[67] the United States Supreme Court addressed whether children could be required to salute the flag as a condition of their attending public school.[68] The Court characterized the conflict as between "the liberty of conscience" and the "authority to safeguard the nation's fellowship,"[69] which it believed put the "judicial conscience . . . to its severest test."[70] The *Gobitis* Court did not deny that a flag salute might offend religious beliefs—it instead suggested that the protection of religious practices is not absolute,[71] and that the importance of the implicated state interest must also be considered. The Court made clear that the state's interest in having children recite the Pledge was of the highest order,[72] as if the fabric of the nation would be torn asunder were an exception to reciting the Pledge made for children with religious objections.[73]

At least one reason the *Gobitis* Court believed the interest so important was that public school children are at an especially impressionable age. Further, because "the formative period in the development of citizenship"[74] was at issue, the Court was reluctant to second-guess the judgment of the legislature "that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country."[75] Ironically, the very factors which may have convinced the *Gobitis* Court to uphold the Pledge requirement may contribute to the current Court's finding a Pledge requirement unconstitutional in those same circumstances.[76]

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that the salute is a religious rite, then their belief prevails and the law must yield to it.").

66. *See id.* at 919; *but see* Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963) ("The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court.").

67. 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

68. *See id.* at 592 ("[Mr. Gobitis] sought to enjoin the authorities from continuing to exact participation in the flag-salute ceremony as a condition of his children's attendance at the Minersville school.").

69. *Id.* at 591.

70. *Id.*

71. *See id.* at 594 ("The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects.").

72. *Id.* at 595 ("We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.").

73. *See id.* at 596 (discussing how the ultimate foundation of society is fostered).

74. *Id.* at 598.

75. *Id.* at 599.

76. *See infra* notes 301-41 and accompanying text (discussing the Court's willingness to insulate children from religious messages which might be thought unproblematic in a different context).

The children who were being expelled from school in *Gobitis* sincerely believed that reciting the Pledge would violate their religious convictions.[77] Justice Stone in his *Gobitis* dissent argued that the Constitution precluded the legislature from forcing these children to affirm something contrary to their religious convictions,[78] absent "a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."[79] Thus, both the majority and the dissent in *Gobitis* believed that individuals could not be forced to affirm something contrary to their own religious beliefs, absent some overriding state interest—the difference between the two was in whether the state in fact had a sufficiently important interest implicated.

Justice Stone's view was vindicated a mere three years later in *West Virginia State Board of Education v. Barnette*.[80] At issue in *Barnette* was a West Virginia law requiring children to participate in the Pledge ceremony, where a failure to conform could result in expulsion,[81] and the child would not be permitted to come back until he or she would conform.[82] A child not attending school could be treated as a delinquent,[83] which might result in the child's being sent to a reformatory.[84] The child's parents would be liable to prosecution for contributing to the delinquency of a minor,[85] which might result in a fine or imprisonment.[86]

The *Barnette* Court did not view public school attendance as merely one option among many, as some of the state courts had,[87] instead it suggested that school attendance was "not optional."[88] The Court noted that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights

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77. *See Gobitis*, 310 U.S. at 601 (Stone, J., dissenting) ("It is not doubted that these convictions are religious, that they are genuine, or that the refusal to yield to the compulsion of the law is in good faith and with all sincerity.").

78. *See id.* at 604 (suggesting that the guaranties of civil liberty protect the individual "from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion.").

79. *Id.* at 607.

80. 319 U.S. 624 (1943).

81. *Id.* at 629 ("Failure to conform is 'insubordination' dealt with by expulsion.").

82. *Id.*

83. *Id.* ("[T]he expelled child is 'unlawfully absent' and may be proceeded against as a delinquent.").

84. *Id.* at 630 ("Officials threaten to send them to reformatories maintained for criminally inclined juveniles.").

85. *Id.* ("Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.").

86. *Id.* at 629 ("His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.").

87. *See supra* notes 26-40 and accompanying text.

88. *Barnette*, 319 U.S. at 632.

of others to do so"[89] and, further, that "their behavior is peaceable and orderly."[90] Echoing Justice Stone's *Gobitis* dissent, the *Barnette* Court noted that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."[91] However,

> censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish[,] . . . [and it] would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.[92]

The State made no showing, however, that students "remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression."[93]

The *Barnette* Court had no quarrel with the state's end but, rather, with the means chosen to accomplish that end.[94] Basically, the Court suggested that students cannot be compelled to recite the Pledge, notwithstanding the Legislature's decision to impose such a requirement. Rather than adopt the *Gobitis* position that the Legislature's decision should not be second-guessed,[95] the *Barnette* Court explained that certain kinds of decisions should be free from legislative interference. The Court noted:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[96]

The Court understood that one of the reasons that the refusal to salute the flag was upsetting was that "the flag involved is our own."[97] However, the Court simply could not believe that there would be dire consequences were the Pledge made voluntary, arguing that such a view underestimated the American people. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary

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89. *Id.* at 630.

90. *Id.*

91. *Id.* at 633.

92. *Id.*

93. *Id.* at 634.

94. *Id.* at 640 ("National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.").

95. *See supra* note 69.

96. *Barnette*, 319 U.S. at 638.

97. *Id.* at 641.

and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[98] Yet, the Court also made clear that the Constitution was not merely designed to offer protection of dissenting views which are harmless, since the "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[99] Indeed, the Court emphasized the primacy of the right at issue—"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[100]

The *Barnette* majority opinion did not focus in particular on the burden imposed by the Pledge requirement on religion—the same analysis offers protection to a student who refuses to participate in the Pledge ceremony for non-religious reasons.[101] Justice Black's *Barnette* concurrence discussed the burden on religion more directly. He too suggested that sincerely held religious beliefs do not immunize the adherent from state laws. "Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."[102] However, where a time-place-manner restriction is not at issue and, for example, the Court "cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation[,]"[103] the regulation must give way to the sincerely held religious beliefs.

Justice Frankfurter dissented in *Barnette* largely because he construed the Pledge requirement as simply "promoting good citizenship and national allegiance[.]"[104] He made clear, however, that an "act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad[,]"[105] or in other words, is unconstitutional. While in the minority in *Barnette*, Justice

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98. *Id.*

99. *Id.* at 642.

100. *Id.*

101. *Cf.* Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) (upholding right of student not to participate in Pledge of Allegiance ceremony). The student objected to the Pledge for political reasons. *See id.* at 636 ("Plaintiff Theodore Goetz . . . refuses to participate in the Pledge of Allegiance because he believes 'that there [isn't] liberty and justice for all in the United States.'"); Holden v. Bd. of Educ. of Elizabeth, 216 A.2d 387, 390 (N.J. 1966) ("Nor does the issue as we see it turn on one's possession of particular religious views . . . . [M]any citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.").

102. *Barnette*, 319 U.S. at 643-44 (Black, J., concurring).

103. *Id.* at 644.

104. *Id.* at 654 (Frankfurter, J., dissenting).

105. *Id.*

Frankfurter took consolation in the thought that previous Courts had taken his side on this matter.[106] Indeed, he noted, "What may be even more significant than this uniform recognition of state authority is the fact that every Justice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned."[107]

In the early cases challenging mandatory recitation of the Pledge in primary and secondary schools, the courts were uniform in their unwillingness to find that such policies violated constitutional guarantees. It was only when the United States Supreme Court issued its *Barnette* decision that school children were recognized as having the constitutional right to refuse to participate in Pledge ceremonies. Unlike the state courts addressing this issue, the Supreme Court recognized that some individuals had religious objections to reciting the Pledge of which the Constitution must take account, notwithstanding the patriotic nature of the Pledge. As the Court recognized in *Thomas v. Review Board of Indiana Employment Security Division*,[108]

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[109]

Once *Barnette* was issued, students could no longer be required to affirm beliefs that violated their consciences. Yet, the recognition that recitation of the Pledge implicates religious beliefs may play an important role in any analysis of the current challenges to Pledge policies under the Establishment Clause.[110]

B. The Later Cases

Eleven years after *Barnette* was issued, Congress modified the Pledge to include the words "under God."[111] Challenges to the Pledge after 1954 involved the claim that the State could not require recitation of the Pledge when it

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106. *Id.* at 664-65 ("I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states.").

107. *Id.*

108. 450 U.S. 707 (1981).

109. *Id.* at 717-18.

110. *See infra* notes 301-41 and accompanying text (discussing how recognition of the religious implications of the Pledge is important to consider when examining the Pledge policies of primary and secondary schools).

111. *See supra* note 11 and accompanying text (noting that the Pledge was modified in 1954).

included those words.[112] The challenges were sometimes made by individuals who objected to being required to make affirmations concerning God and sometimes by individuals who objected to having to hear such affirmations, even though they themselves were not required to make them.[113] As a general matter, the former but not the latter challenges have been sustained, although courts have been too quick to dismiss the implications of the former for the constitutionality of the latter.

Sheldon v. Fannin[114] involved a refusal by students to stand while the National Anthem was sung.[115] They explained that they could not even stand silently during the Anthem without violating their religious convictions,[116] although they did not feel similar compunctions about standing during the recitation of the Pledge of Allegiance.[117] While *Fannin* did not involve a challenge to the Pledge per se, it nonetheless is helpful to consider because it provides the analysis that will subsequently be used when analogous challenges are made to the Pledge.

The *Fannin* court characterized the singing the National Anthem "[as] not a religious but a patriotic ceremony, intended to inspire devotion to and love of country"[118] and, further, suggested that any "religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation."[119] Indeed, the court suggested that "[t]he Star Spangled Banner may be freely sung in the public schools, without fear of having the ceremony characterized as an 'establishment of religion' which violates the First Amendment[,]"[120] fourth stanza notwithstanding.[121] However, the court

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112. *See, e.g.*, Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437, 448 (7th Cir. 1992) (rejecting challenge to the Pledge based on its reference to God).

113. *See* Frazier v. Alexandre, 434 F. Supp. 2d 1350 (S.D. Fla. 2006) (involving a student who challenged his treatment for his refusal to stand and say the Pledge); *Sherman*, 980 F.2d at 437 (challenging the recitation of Pledge, even though child was not forced to say it).

114. 221 F. Supp. 766 (D. Ariz. 1963).

115. *See id.* at 768 ("On September 29, 1961, the plaintiffs were suspended from Pinetop Elementary School for insubordination, because of their refusal to stand for the singing of the National Anthem.").

116. *Id.* ("This refusal to participate, even to the extent of standing, without singing, is said to have been dictated by their religious beliefs as Jehovah's Witnesses . . . .").

117. *Id.* ("[B]y some process of reasoning we need not tarry to explore, they are willing to stand during the Pledge of Allegiance, out of respect for the Flag as a symbol of the religious freedom they enjoy.").

118. *Id.* at 774.

119. *Id.* (comparing Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962)).

120. *Id.*

121. The fourth stanza of the Star Spangled Banner reads:

O thus be it ever when free-men shall stand
Between their lov'd home and the war's desolation;
Blest with vict'ry and peace, may the heav'n-rescued land
Praise the Pow'r that hath made and preserve'd us a nation!

distinguished between the requirements of the Establishment and Free Exercise Clauses[122] and held that the students could not be expelled "solely because they silently refuse to rise and stand for the playing or singing of the National Anthem."[123]

Smith v. Denny[124] involved one of the first challenges to the Pledge of Allegiance based on its inclusion of the words "under God."[125] The *Denny* court cited with approval *Fannin*'s treatment of the religious references in the Star Spangled Banner—"Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation."[126] Interestingly, the court also cited an interpretation of

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> Then conquer we must, when out cause is just,
> And this be our motto: "In God is our trust!"
> And the star-spangled banner in triumph shall wave
> O'er the land of the free and the home of the brave.

Francis Scott Key, *The Star Spangled Banner* (1814), *available at* www.infoplease.com/ipa/A0194015.html. The fourth stanza of My Country Tis of Thee reads:

> Our fathers' God, to thee,
> author of liberty,
> to thee we sing;
> long may our land be bright
> with freedom's holy light;
> protect us by thy might,
> great God, our King.

Samuel Francis Smith, *My Country Tis of Thee* (1832), *available at* http://cityofoaks.home.netcom.com/tunes/MyCountryTisOfThee.html. For comments about how these would fare were the recitation of the Pledge of Allegiance in public schools declared unconstitutional, see Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 492-93 (9th Cir. 2003) (Fernandez, J., concurring and dissenting), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004).

> My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America The Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth. And currency beware!

Id.

122. *Fannin*, 221 F. Supp. at 774-75 ("[I]t should be observed that lack of violation of the 'establishment clause' does not ipso facto preclude violation of the 'free-exercise clause.'").

123. *Id.* at 775; *see also* Circle Sch. v. Phillips, 270 F. Supp. 2d 616, 622 (E.D. Pa. 2003) ("[I]f the Act does not allow students to opt out of reciting the Anthem, it violates their First Amendment rights.").

124. 280 F. Supp. 651 (E.D. Cal. 1968).

125. *See id.* at 652 ("Plaintiffs assert that the regulation, by requiring inclusion of the words 'under God' violates the first and fourteenth amendments.").

126. *See id.* at 654 (citing *Fannin*, 221 F. Supp. at 774).

the National Anthem suggested in *Engel v. Vitale*,[127] in which Justice Black referred to "officially espoused anthems which include the *composer's* professions of faith in a Supreme Being."[128] In addition, the *Denny* court cited Justice Brennan's concurrence in *School District of Abington v. Schempp*[129] in which Justice Brennan suggested that it had not been shown that daily recitation of the Pledge "may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government."[130]

Yet, someone reciting the Pledge—"I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all"[131]—would be unlikely to believe that she, by reciting the words "under God," was merely acknowledging the beliefs of the Pledge's composer[132] or merely acknowledging that faith has inspired many Americans.[133] Rather, she presumably would believe that she, herself, was making a statement involving God,[134] e.g., that the nation was under God.[135] Just as a flag salute involves a personal statement by the saluter which,

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127. 370 U.S. 421 (1962).

128. *See Denny*, 280 F. Supp. at 653 (citing *Engel*, 370 U.S. at 435 n.21) (emphasis added).

129. 374 U.S. 203 (1963).

130. *Denny*, 280 F. Supp. at 653 (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring)).

131. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 6 (2004).

132. Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 489 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004) ("The Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith.").

133. *See id.* at 487 ("The recitation that ours is a nation 'under God' is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic."); *see also* Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) ("The Pledge has no statement about what many Americans believe, or about what the Founders believed.").

134. *Newdow I*, 328 F.3d at 489 ("The Pledge . . . is, by design, an affirmation by the person reciting it."); *see also* Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1917 (2003) ("The formal recitation of a patriotic affirmation is different in kind from other manifestations of religion in coins or songs because it involves the government seeking a direct affirmation of religious belief by all those saying the Pledge."); Laycock, *supra* note 133, at 224 ("There is only a profession of what each person taking the Pledge believes: 'I pledge allegiance to . . . one Nation under God.'").

135. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring) ("To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority.").

when forced, can be a serious infringement of personal liberties,[136] being forced to utter the words in the Pledge might involve a serious infringement of personal liberties.

The jurisprudence in this area makes little sense if the words of the Pledge are interpreted merely to reflect *others'* beliefs. Individuals who refused to say the Pledge were sincerely claiming that the words of the Pledge did not represent their *own* beliefs—these individuals were not arguing that the words of the Pledge did not represent the beliefs of others.

Even Justice Brennan's *Schempp* concurrence is not particularly persuasive for the proposition that the Pledge passes muster when one considers some of the alternative ways that the state can instill patriotism in children.[137] For example, the state could have children recite the Pledge as it existed in 1950, i.e., before the words "under God" were added. Indeed, it is not at all clear what additional patriotism would be inculcated by including the words "under God" within the Pledge.[138] If, however, no additional patriotism would be instilled by adding those words, then the State can achieve the desired secular purposes without entering the thicket created when God and the State are linked. By choosing to incorporate a religious message when the state could have achieved the same secular end without incorporating such a message, the state violates the Establishment Clause.[139]

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136. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (discussing the serious infringement upon personal liberties which may be involved in cases in which an individual is compelled to salute the flag). *But cf. id.* at 722 (Rehnquist, J., dissenting) ("The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God We Trust.'").

137. Indeed, Justice Brennan may have been attempting to be reassuring rather than persuasive. *See* Gey, *supra* note 134, at 1909.

> [C]onsider the tentative phrasing of his comments. . . . [T]he possibility that he and a majority of the Court would approve many common religious exercises would reassure skeptical members of the public that the Court's new school-prayer and school-Bible-reading decisions would not lead to the extirpation of all evidence of religiosity from public life.

Id.

138. *See id.* at 1907 ("[I]t is implausible that the addition of the words 'under God' in 1954 added any solemnity to a Pledge that had seen the country through two world wars without those words; the words 'under God' added something else in addition to solemnity—that is, a religious gloss on an already solemn affirmation.").

139. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring) ("[I]t seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice."); Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 383 (1963) ("[W]hen a secular activity by government results not only in attainment of a civil objective, but also promotes religion, the establishment clause is violated if the civil goal may be accomplished *just as well* by means that do not promote religion."); *see also* Gey, *supra* note 134, at 1911-12 (discussing Brennan's *Schempp*

In *Sherman v. Community Consolidated School District*,[140] a federal district court addressed whether an Illinois statute requiring the daily recitation of the Pledge of Allegiance in elementary schools violated constitutional guarantees.[141] On appeal,[142] the Seventh Circuit Court of Appeals affirmed that the state statute did not violate constitutional guarantees,[143] characterizing the Pledge as secular,[144] rejecting that "ceremonial references in civic life to a deity [must] be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods[,]"[145] and suggesting that a much different analysis would have been appropriate had it instead been a prayer.[146]

The *Sherman* court offered several justifications for its position. For example, it noted that there were numerous instances throughout our history in which references to God were made, sometimes by the Framers,[147] and also that members of the Court had indicated in dicta that they believed the Pledge constitutional.[148] The court also feared that striking the Pledge as

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concurrence).

140. 758 F. Supp. 1244 (N.D. Ill. 1991), *aff'd in part, vacated in part*, 980 F.2d 437 (7th Cir. 1992).

141. *Id.* at 1245 ("Plaintiffs Robert Sherman and his minor son Richard Sherman are atheists and they allege that the Illinois statute which provides for the daily recitation of the Pledge of Allegiance in public elementary schools violates their rights under the First and Fourteenth Amendments to the Constitution.").

142. Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992).

143. *Id.* at 439 ("We conclude that schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate.").

144. *Id.* at 445 ("All of this supposes that the Pledge is a secular rather than sectarian vow.").

145. *Id.*

146. *Id.* ("Everything would be different if it were a prayer or other sign of religious devotion. Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?").

147. *Id.* at 445-46.

> James Madison, the author of the first amendment, issued presidential proclamations of religious fasting and thanksgiving. Thomas Jefferson, who refused on separationist grounds to issue thanksgiving proclamations, nonetheless signed treaties sending ministers to the Indians. The tradition of thanksgiving proclamations began with President Washington, who presided over the constitutional convention. From the outset, witnesses in our courts have taken oaths on the Bible, and sessions of court have opened with the cry "God save the United States and this honorable Court." Jefferson's Declaration of Independence contains multiple references to God (for example: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."). When Madison and Jefferson wrote their famous declarations supporting separation of church and state, they invoked the name of the Almighty in support.

Id.

148. *Id.* at 447-48.

unconstitutional would have other implications for what might be taught in school, for example, in the sciences.[149]

In *Newdow v. United States Congress*,[150] the Ninth Circuit struck down a school policy mandating recitation of the Pledge in public schools as a violation of constitutional guarantees.[151] The court held that the "school district policy impermissibly coerces a religious act" and thus violated the First Amendment.[152] The United States Supreme Court reversed, holding that the plaintiff did not have standing to bring the action.[153]

In *Myers v. Loudoun County Public Schools*,[154] the plaintiff asserted that "because of the inclusion of the words 'under God,' the Pledge is a religious exercise and that, accordingly, the Recitation Statute violates the Establishment Clause."[155] The *Myers* court rejected the constitutional challenge, echoing the *Sherman* court by noting the many historical practices involving references to God[156] and that members of the Court have consistently suggested that the Pledge

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> An outcry in dissent that one or another holding logically jeopardizes the survival of this tradition always provokes assurance that the majority opinion carries no such portent. *Engel* was the first of these, and *Allegheny* the most recent: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief . . . . We need not return to the subject of 'ceremonial deism,' . . . because there is an obvious distinction between creche displays and references to God in the motto and the pledge."

Id. (citations omitted).

149. *Id.* at 444.

> The diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons. The problem extends past government and literature to the domain of science; the religious debate about heliocentric astronomy is over, but religious debates about geology and evolution continue. An extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in every classroom.

Id.

150. 328 F.3d 466 (9th Cir. 2003), *rev'd* 542 U.S. 1 (2004).

151. *Id.* at 487 ("[W]e conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional.").

152. *Id.*

153. *See* Elkgrove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 5 (2004) ("We conclude that Newdow lacks standing and therefore reverse the Court of Appeals' decision.").

154. 418 F.3d 395 (4th Cir. 2005).

155. *Id.* at 399.

156. *Id.* at 403-04. The *Myers* court cited *Sherman* for the proposition that it is important to consider the practices of the Framers. *See id.* at 404 ("The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" (citing Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437, 445 (7th Cir. 1992))).

passes constitutional muster.[157] Indeed, the *Myers* court remarked that "it is perhaps more noteworthy that, given the vast number of Establishment Clause cases to come before the Court, *not one Justice has ever suggested that the Pledge is unconstitutional.* In an area of law sometimes marked by befuddlement and lack of agreement, such unanimity is striking."[158]

Yet, the *Myers* court's point is somewhat misleading, because the Justices were sometimes upholding the constitutionality of the Pledge, current jurisprudence notwithstanding. For example, in his *Newdow* concurrence, Justice Thomas wrote, "I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional."[159] Thus, while it is correct to say that Justice Thomas would not strike down a policy requiring recitation of the Pledge,[160] that is because he rejects the existing jurisprudence.[161] If Justice Thomas's understanding of the relevant jurisprudence is accurate, however, then those non-activist Justices who wish to apply rather than recreate the relevant constitutional law, and those inferior courts who wish to follow their duty and apply existing law, are required to strike policies mandating the recitation of the Pledge in primary schools. At the very least, such a surprising result suggests that the current jurisprudence in this area should be examined carefully to see whether Justice Thomas's analysis is correct.

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157. *Id.* at 405.

> [T]he Court and the individual Justices thereof have made clear that the Establishment Clause, regardless of the test to be used, does not extend so far as to make unconstitutional the daily recitation of the Pledge in public school. Beginning with *Engel,* in every case in which the Justices of the Court have made mention of the Pledge, it has been as an assurance that the Pledge is not implicated by the Court's interpretation of the Establishment Clause.

Id.; *see also* Tara P. Beglin, Note, *"One Nation Under God," Indeed: The Ninth Circuit's Problematic Decision to Change Our Pledge of Allegiance*, 20 ST. JOHN'S J. LEGAL COMMENT. 129, 153 (2005) ("On numerous occasions, Supreme Court Justices have reflected in dicta upon the constitutionality of the Pledge of Allegiance and have noted that the Pledge is not a prayer and is thereby constitutionally sound.").

158. *Myers*, 418 F.3d at 406.

159. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 49 (2004) (Thomas, J., concurring); *see also infra* notes 350-51 and accompanying text (discussing Justice Kennedy's belief that the *Allegheny* majority opinion required the constitutional invalidation of the Pledge); *infra* note 318 and accompanying text (discussing Justice Scalia's comments about *Lee*'s implications for the constitutionality of the Pledge).

160. *Newdow II*, 542 U.S. at 45 (Thomas, J., concurring) ("We granted certiorari in this case to decide whether the Elk Grove Unified School District's Pledge policy violates the Constitution. The answer to that question is: 'no.'").

161. *Id.* at 49 ("I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that *Lee* was wrongly decided.").

II. THE EXISTING ESTABLISHMENT CLAUSE JURISPRUDENCE

Numerous jurists and commentators have noted that the existing Establishment Clause jurisprudence is confused and in need of either clarification or, perhaps, a fundamental rethinking.[162] The Court has offered several tests to determine whether an action by the State violates the Establishment Clause without clearly specifying the conditions under which particular tests should be applied. The Court has thereby created the possibility that a particular state action would pass one test but fail another, making that action's constitutionality indeterminate. Of course, in some cases, it will not matter which test is applied because the implicated state action violates each of them. Arguably, the recitation of the Pledge in primary schools is such a case, as will become clear when each of the tests is examined.

A. *The* Lemon *Test*

In *Lemon v. Kurtzman*[163] the Court set out its three-part test to determine whether the Establishment Clause has been violated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an 'excessive government entanglement with religion.'"[164] The Court has made clear that "[s]tate action violates the Establishment Clause if it fails to satisfy any of these prongs."[165]

These factors require further explanation. On the one hand, as Justice Powell made clear, it will not suffice to establish that there was a religious purpose to fail the first prong—that religious purpose must have been the predominant purpose behind the challenged action.[166] On the other hand, the mere existence of a secular purpose will not immunize the state action if religious purposes

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162. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) ("[T]he incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application."); Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (discussing "the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*"); William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) ("From the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common."); Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 33 (2005) (discussing "the fog obscuring . . . Establishment Clause jurisprudence generally"); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 294 (2003) (describing the Court's Establishment Clause jurisprudence as "confused").

163. 403 U.S. 602 (1971).

164. *Id.* at 612-13 (citations omitted).

165. Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

166. *Id.* at 599 (Powell, J., concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.").

dominate.[167] As the Court recently confirmed in *McCreary County v. ACLU*,[168] "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[169]

By the same token, if the principal effect of a particular action is to promote religion, then that act cannot pass constitutional muster. However, there has been an evolving standard with respect to what in fact would violate the standard. For example, in *Meek v. Pittenger*,[170] the Court struck down a Pennsylvania law authorizing public funding of auxiliary services such as guidance counseling and testing services to children in religious schools.[171] The Court feared either that these personnel would impermissibly foster religious belief or that the state would have to engage in continuing surveillance to make sure that no impermissible fostering occurred.[172] The former would violate the effects provision while the latter would violate the entanglement provision. In *School District of Grand Rapids v. Ball*,[173] the Court struck down a program in which classes were taught at public expense by public employees in classrooms located in and leased from religious schools.[174] The Court again worried that public employees might be offering religious instruction.[175] Yet, the understanding of *Lemon* that prevailed in *Meek* and *Ball* no longer reflects the current jurisprudence.

The effects provision of the *Lemon* Test was somewhat modified in *Agostini v. Felton*.[176] The *Agostini* Court explained that while "government inculcation of religious beliefs has the impermissible effect of advancing religion,"[177] the Court has "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[178] The Court further explained that it no longer subscribed to the view that "all government aid that

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167. Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.").

168. 545 U.S. 844 (2005).

169. *Id.* at 860.

170. 421 U.S. 349 (1975), *overruled in part by* Mitchell v. Helms, 530 U.S. 793 (2000).

171. *See id.* at 353 n.2.

172. *See id.* at 372.

173. 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

174. *Id.* at 375.

175. *Id.* at 387.

176. 521 U.S. 203 (1997).

177. *Id.* at 223.

178. *Id.*

directly aids the educational function of religious schools is invalid."[179] The Court instead seems to have adopted a kind of neutrality principle whereby funding of religious activity is permissible if a variety of secular activities are also being funded.[180]

The entanglement provision of *Lemon* sought to prevent two evils. First, where the state would have to monitor constantly to ensure that government funds were not being used to promote religion, there was some fear that the religious institution itself would be changed.[181] Second, there was a fear that excessive connections between the state and religion might foster the view that religion was being given a special political role or, perhaps, that political constituencies might be forged along religious lines.[182] Both of these fears might be characterized as possible effects of excessive entanglement and, ultimately, the *Agostini* Court suggested that the entanglement prong of *Lemon* is better analyzed "as an aspect of an inquiry into a statute's effect."[183]

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179. *Id.* at 225.

180. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 875-76 (2005) ("Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."); *see also* Philip N. Yannella, *Stuck in the Web of Formalism: Why Reversing the Ninth Circuit's Ruling on the Pledge of Allegiance Won't Be So Easy*, 12 TEMP. POL. & CIV. RTS. L. REV. 79, 90 (2002) ("The trend for the past decade has been for the Court to invoke the so-called 'neutrality' test in order to bypass the more rigid requirements of *Lemon*.").

181. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (discussing "excessive entanglement with religious institutions, which may interfere with the independence of the institutions").

182. *Id.* at 687-88 (1984) (O'Connor, J., concurring) (discussing how "excessive entanglement with religious institutions . . . may . . . give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines.").

183. *Agostini*, 521 U.S. at 233; *see also* Mitchell v. Helms, 530 U.S. 793, 807-08 (2000).

> [I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. . . . [O]ur cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect.

Id. (citation omitted). However, some lower courts continue to analyze entanglement as a separate prong. *See, e.g.*, Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1261 (10th Cir. 2005) ("*Lemon*'s final prong provides that a challenged governmental action 'must not foster "an excessive government entanglement with religion."'" (citation omitted)).

To make matters even more confusing, the weight of the test has itself varied across decisions. Professor Marshall explains that the role of the *Lemon* "test in resolving the establishment inquiry is ambiguous. At times the Court has described the test as a helpful signpost, at other times the Court has suggested that it can be discarded in certain circumstances, at still other times the Court has held that it must be rigorously applied."[184]

Suppose that the constitutionality of the statute mandating that the Pledge incorporate the words "under God" were to be evaluated in light of the *Lemon* Test. It is quite unlikely that the statute could survive examination under the first prong, since the historical evidence that the Pledge was intended to promote religion is very strong.[185] First, the precipitating cause of the addition of these words to the Pledge was a sermon in which the Reverend George M. Docherty complained that the Pledge did not contain the "definitive factor in the American way of life [which] was God Himself."[186] As a result of this sermon, "no fewer than seventeen bills were introduced to incorporate God into the Pledge of Allegiance."[187] When Congress was debating whether to include "under God," it was suggested that God is the source of all of the country's power and should be recognized as that source.[188] The House[189] and Senate[190] Reports regarding the addition of "under God" made their religious objectives clear. Even the President when signing the relevant bill into law made clear the religious nature

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184. Marshall, *supra* note 162, at 497.

185. *See* Epstein, *supra* note 14, at 2151-52 ("The addition of the words 'under God' to the Pledge of Allegiance . . . was intended to [] have the effect of endorsing religion. . . . As the sponsor of the Pledge amendment stated, the legislation was intended to contrast America's embrace of Almighty God with Communist Russia's embrace of atheism."); Gey, *supra* note 134, at 1907 (discussing "the evidence in the record as to the clear-cut religious purpose motivating the 1954 statute"); Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1658 (2006) ("The particularly religious significance of the words 'under God' is apparent not only in the fact that Congress specifically added those words to the Pledge twelve years after first enacting it without religious references, but also on the face of the Pledge, which declares the speaker's affirmative belief that the 'United States of America' is 'one nation, under God.'"); Yannella, *supra* note 180, at 79-80 ("A very good argument can be made that the language was included in the Pledge for the purpose of endorsing religion, which is a clear violation under the *Lemon* test.").

186. Epstein, *supra* note 14, at 2119.

187. *Id.*

188. Walter Lynch, Comment, *"Under God" Does Not Need to Be Placed Under Wraps: The Phrase "Under God" Used in the Pledge of Allegiance Is Not an Impermissible Recognition of Religion*, 41 HOUS. L. REV. 647, 655 (2004) ("Another theme throughout the congressional debates was that God is the source of the power of the United States and should be recognized for it."); *see also* Epstein, *supra* note 14, at 2119-20 ("Repeated reference was made to America as a religious, and to some, a Christian, nation, which was morally compelled to incorporate that spirituality into its national pledge.").

189. *See* Gey, *supra* note 134, at 1876-77.

190. *See id.* at 1877-78.

of the addition.[191] Thus, the officials instrumental in the addition of "under God" to the Pledge made no attempt to hide their religious purposes.[192] Further, lest it be argued that this is not the kind of evidence that the Court is permitted to consider, one need only consider the Court's comments in *Santa Fe Independent School District v. Doe*:[193] "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."[194]

Presumably, it would not even be necessary to consider the second prong. As the Court suggested in *Edwards v. Aguillard*,[195] "A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general . . . or by advancement of a particular religious belief."[196] Further, as the *Aguillard* Court made clear, "If the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary.'"[197]

In order to determine whether the Pledge violates the first prong of the *Lemon* Test, one must characterize the predominant purpose behind the Pledge.[198] Consider the claim that the purpose behind amending the Pledge was political *rather* than religious, because the United States was attempting to differentiate itself from the Soviet Union in 1954 when adding the words "under God" to the Pledge.[199]

Yet, this is a false dichotomy, because these are not mutually exclusive categories. The Pledge can be both political and religious, a point which the Fourth Circuit seems not to have appreciated in *Myers v. Loudoun County Public Schools*.[200] The *Myers* court recognized that "the Pledge contains a religious phrase, and [that] it is demeaning to persons of any faith to assert that the words 'under God' contain no religious significance[,]"[201] but then decided that the "inclusion of those two words . . . does not alter the *nature* of the Pledge as a

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191. *Id.* at 1878 ("A brief perusal of Eisenhower's official statement explaining his support for the legislation reveals that the President shared the deep religious sentiments expressed by those in the legislative branches . . . .").

192. *Id.* at 1873 ("[T]he elected officials responsible for adding the two words to the existing Pledge specifically and repeatedly announced that strong religious sentiments motivated their action.").

193. 530 U.S. 290 (2000).

194. *Id.* at 315.

195. 482 U.S. 578 (1987).

196. *Id.* at 585 (citations omitted).

197. *Id.* (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

198. *See supra* note 166 and accompanying text.

199. *See* David A. Toy, *The Pledge: The Constitutionality of an American Icon*, 34 J.L. & EDUC. 25, 42 (2005) ("Congress' motive in adding the words 'under God' to the pledge was political, not religious.").

200. 418 F.3d 395 (4th Cir. 2005).

201. *Id.* at 407.

patriotic activity."[202] The court implied that the Pledge passes constitutional muster because "the Pledge, unlike prayer, is not a religious exercise or activity, but a patriotic one[,]"[203] as if a patriotic activity could not also be religious[204] and as if religious affirmations are permissible as long as they are in the context of a patriotic activity. However, such a view implies that the government can endorse a variety of religious beliefs as long as it does so in the context of some patriotic exercise[205] and potentially constitutionally immunizes a linking which can be especially worrisome.[206]

If the goal behind amending the Pledge in 1954 had been strictly political, there would have been ways to emphasize the differences between the United States and Soviet Union without affirming theistic beliefs. For example, language might have been included in the Pledge to emphasize that the United States protects the right of all individuals to worship or not worship as they choose. Such a focus would have emphasized the liberty upon which this country was founded rather than particular theistic beliefs. Further, a pledge that instills and inspires patriotism by emphasizing a respect for religious liberty is much more likely to be viewed as not favoring one religion over another,[207] as well as

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202. *Id.*

203. *Id.*

204. *Id.* at 410 (Motz, J., concurring) ("To suggest that a pledge to a country 'under God' does not constitute a religious activity might seem to denigrate the importance and sanctity of the belief in God held by many.").

205. Such a view has surprising implications. *See* Laycock, *supra* note 133, at 231.

> But supporters of the Pledge argued that its patriotic elements determined the character of the Pledge as a whole . . . . If accepted, that argument would lead to a regime in which government could freely sponsor religious observances, so long as each religious observance was combined with a sufficient quantity of political observance to bring the combined whole under the rule for government-sponsored political speech instead of the quite different rule for government-sponsored religious speech.

Id.

206. *Myers*, 418 F.3d at 410 (Motz, J., concurring) ("[I]t is the conjunction of religion and the state that affronts Myers' deeply-held religious convictions and the teachings of his Anabaptist Mennonite faith."); *cf.* McCollum v. Bd. of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., dissenting) ("Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."); Adland v. Russ, 307 F.3d 471, 486-87 (6th Cir. 2002) ("As a general matter, the inclusion of secular symbols in a display may dilute a message of religious endorsement. In this case, however, the monument's combination of revered secular symbols like the American flag and the Ten Commandment [sic] serves to link government and religion in an impermissible fashion."); Pnina Lahav, *The Republic of Choice, the Pledge of Allegiance, the American Taliban*, 40 TULSA L. REV. 599, 602 (2005) ("Dr. Newdow wants the Court to remove the generally beloved, awe-inspiring phrase 'under God' from the Pledge of Allegiance. The resulting surgery performed upon the Pledge would be dramatic. It would force the severance of the formal ties between God and Nation."); Laycock, *supra* note 133, at 229 ("The Pledge expressly links not just religion and government, but also religion and loyalty.").

207. *See infra* note 244 and accompanying text (discussing Justice O'Connor's admission that

not favoring religion over non-religion than is a pledge which instills and inspires patriotism by emphasizing a belief in God.

Some commentators suggest that the current Pledge passes constitutional muster because it merely establishes that the nation is "under God," meaning it is a limited government subject to rights (and presumably duties) created by God.[208] Yet, there are a host of reasons that this cannot be correct. Such a view commits the state to a variety of theistic beliefs, for example, that there is a God (rather than no god or many gods),[209] that God has created or imposed human rights and duties (rather than having been concerned with other matters), and that those rights and duties are superior rather than subservient to those created or imposed by the State.

Others believe that the Pledge passes muster because it merely asserts that God is guiding the Nation,[210] as if acknowledgment of God's existence and active role in the state's affairs do not qualify as religious beliefs. If there is no violation of the Establishment Clause when the state asserts that it is limited by God-given rights (whose contents are defined by majority view?) or that it is subject to God's authority[211] or even that it acts with God's guidance,[212] then the Establishment Clause protections are very weak indeed.

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the Pledge might seem to favor certain religions over others).

208. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 67 (2003) ("It is quite plausible to argue that the inclusion of the phrase is permissible because it does no more than express a religious rationale for the ideal of limited government and inalienable rights."); Emily D. Newhouse, Comment, *I Pledge Allegiance to the Flag of the United States of America: One Nation Under No God*, 35 TEX. TECH L. REV. 383, 400 (2004) ("[T]he statement that the United States is a nation under God-even in the context of the Pledge of Allegiance—is not a profession of any religious belief. Rather, the phrase is an acknowledgment of a more fundamental belief—that because individuals are endowed with certain inalienable rights by God, the authority of government with respect to such rights must necessarily be limited.").

209. Gey, *supra* note 134, at 1906 ("Although Senator Bennett may be correct that the word 'God' is comprehensive enough to satisfy theists (or at least monotheists), it defies logic to assert that the word 'God' is 'sufficiently universal and nonspecific' to encompass the concepts of agnosticism or atheism. The term 'God' cannot be stretched to mean 'the absence of God.'").

210. Andonian, *supra* note 12, at 120 ("Furthermore, the House Report explicitly states that the addition of the phrase 'under God' is not an endorsement of a religious institution but merely recognizes the guidance of God in national affairs."); Newhouse, *supra* note 208, at 388 ("Finally, the conference report specifically stated: . . . The phrase 'under God' recognizes only the guidance of God in our national affairs." (citation omitted)).

211. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 40 (2004) (O'Connor, J., concurring) ("Even if taken literally, the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority.").

212. Berg, *supra* note 208, at 70 ("If the Court struck down the acknowledgment [of God], it would have to rule explicitly that the Constitution forbids the state to recognize that it is limited by divine authority.").

B. The Endorsement Test

The Endorsement Test, often associated with Justice O'Connor,[213] has sometimes been described as an alternative to *Lemon*[214] and sometimes as a part of *Lemon*.[215] The test focuses on the reactions of a reasonable, knowledgeable observer to the action at issue.[216] The relevant question is whether the action at issue would make that observer feel like a political outsider.[217] As Justice O'Connor explains in her *Newdow II* concurrence, "the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred."[218]

Justice O'Connor specifically addresses how the reasonable observer would react to various patriotic songs and oaths containing references to God. "The reasonable observer . . . , fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-religion."[219] Because such acknowledgments "serve the secular purposes of 'solemnizing public occasions' and 'expressing confidence in the future'"[220] and

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213. *See, e.g.*, Steven A. Seidman, County of Allegheny v. American Civil Liberties Union*: Embracing the Endorsement Test*, 9 J.L. & RELIGION 211, 224 (1991) ("The majority opinion [in *Allegheny*] written by Justice Blackmun adopted the Endorsement test set forth by Justice O'Connor in her concurring opinion in *Lynch*.").

214. *See, e.g.*, Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d 247, 261 (3d Cir. 2003) ("Under the 'endorsement' approach, we do not consider the County's purpose in determining whether a religious display has violated the Establishment Clause; instead, we focus on the *effect* of the display on the reasonable observer, inquiring whether the reasonable observer would perceive it as an endorsement of religion.").

215. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 787 (1995) (Souter, J., concurring) ("Effects matter to the Establishment Clause, and one, [sic] principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer.").

216. *Newdow II*, 542 U.S. at 35 (O'Connor, J., concurring) ("The reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.").

217. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.").

218. *Newdow II*, 542 U.S. at 33-34 (O'Connor, J., concurring) (citation and internal quotation marks omitted).

219. *See id.* at 36.

220. County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)).

because "the Pledge has become . . . our most routine ceremonial act of patriotism,"[221] the reasonable observer would simply view the ceremonial references to God as "the inevitable consequence of the religious history that gave birth to our founding principles of liberty."[222]

Justice O'Connor explains that where there has been no endorsement, the state's acknowledgment of religion can pass constitutional muster.[223] However, where the government endorses or takes a position on questions of religious belief, it violates the Establishment Clause,[224] at least if that endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[225]

Yet, Justice O'Connor's characterization of the reasonable observer is a little misleading. She is not concerned with whether sincere individuals would in fact feel disfavored because of their religious beliefs. She notes, "Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."[226] She cites her own discussion in *Capitol Square Review and Advisory Board v. Pinette*[227] to explain her point, where she noted that there "is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."[228]

Justice O'Connor is implicitly suggesting that the person with the particular quantum of knowledge is misconstruing an action by the state as an endorsement because the quantum of knowledge possessed by that person is too small. If the person knew more, one might conclude, then she would not misconstrue the state's action as an endorsement. Justice O'Connor explains that

> because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the

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221. *Newdow II*, 542 U.S. at 38 (O'Connor, J., concurring).

222. *Id.* at 44.

223. *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring) ("Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement.").

224. *Id.* at 593-94 ("The [Establishment] Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (citing *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring))).

225. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

226. *See Newdow II*, 542 U.S. at 34-35 (O'Connor, J., concurring) (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring)).

227. 515 U.S. 753 (1995).

228. *See id.* at 780 (O'Connor, J., concurring).

> reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.[229]

Justice O'Connor seems to be suggesting that an individual with sufficient knowledge of the Pledge's origin and context could not believe it an endorsement of religion. Yet, someone aware of the history of the amendment to the Pledge might well construe the addition of "under God" as an endorsement.[230] Indeed, some would argue that only those with a less than full quantum of knowledge would be tempted to believe that it was not an endorsement.[231]

Justice O'Connor does not attempt to explain why the reasonable observer would think that the Pledge's inclusion of "under God" is an inevitable consequence of the nation's religious history, given that the Pledge did not include a reference to God for over half a century. Suppose however, that such an explanation could be offered. Suppose further that some, but not all, observers accepted Justice O'Connor's claim that the inclusion of "under God" is an inevitable consequence of the nation's religious history. Even so, that would not be enough to save Justice O'Connor's claim that the addition of "under God" to the Pledge passes the Endorsement Test.

The Endorsement Test does not require that *all* knowledgeable, reasonable persons see the Pledge as an endorsement of religion in order for the Pledge to violate the Establishment Clause. On the contrary, the test merely requires that a reasonable person with a full appreciation of the Pledge's origin and context might see it that way. Given the stated purposes behind adding "under God" to the Pledge,[232] it seems difficult to deny that some (even if not all) reasonable, knowledgeable individuals would see the addition of those words as an endorsement of religion.

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229. *See Newdow II*, 542 U.S. at 35 (O'Connor, J., concurring).

230. *See supra* notes 185-207 and accompanying text (discussing why the purpose behind amending the Pledge violates the Purpose prong of *Lemon*).

231. *See* Gey, *supra* note 134, at 1912-13.

> In the end, the biggest problem with the various attempts to argue that the phrase "under God" in the context of the Pledge is a nonreligious concept is that these attempts are all utterly implausible except as mechanisms to avoid the clear application of the Establishment Clause. The notion that "under God" is not religious is inconsistent with any non-tendentious effort to define the key term—"God"—and with any reasonable reading of the stated intentions of the relevant political actors in both 1954 and 2002, when politicians throughout Washington rushed to expend legislative time and governmental dollars to defend the linkage of God and country. These politicians used "God in its religious context and said so publicly."

Id.

232. *See supra* notes 186-92 and accompanying text (discussing the context in which the amendment to the Pledge was adopted).

C. Ceremonial Deism

Justice O'Connor has suggested that the Pledge is an example of Ceremonial Deism,[233] a term which suggests that a passage incorporating a religious reference may have lost its religious significance over time and thus is not constitutionally objectionable.[234] While the term's first appearance in a Supreme Court opinion was in Justice Brennan's dissent in *Lynch v. Donnelly*,[235] it plays an important role in Justice O'Connor's endorsement theory because it allegedly explains why a reasonable observer would not think a reference to God involves an endorsement of religion by the State. The Court has neither explicitly embraced nor explicitly rejected the notion of ceremonial deism.[236] In his *Lynch* dissent, Justice Brennan wrote,

> While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow's apt phrase, as a form a "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.[237]

The first point to note, however, is that Justice O'Connor has a somewhat different understanding of ceremonial deism than does Justice Brennan. To Justice Brennan, but not Justice O'Connor, a phrase can be understood as a form of ceremonial deism when it has been drained of significant religious content. While Justice O'Connor suggests that "the appearance of the phrase 'under God' in the Pledge of Allegiance constitutes an instance of . . . ceremonial deism,"[238] she also recognizes that this reference "speak[s] in the language of religious belief,"[239] and that this is an acknowledgment of or reference to "the divine."[240] She does not claim that the word "God" has lost its religious meaning[241]—she

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233. *See Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

234. Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1772 (1993) (describing phrases including "God" that "have largely or totally lost their religious significance because of their passive character or their longstanding repetition in a civic context").

235. 465 U.S. 668 (1984).

236. *See* County of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) ("We need not return to the subject of 'ceremonial deism,' because there is an obvious distinction between creche displays and references to God in the motto and the pledge. However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." (citation omitted)).

237. *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) (citation omitted).

238. *See Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

239. *Id.* at 35.

240. *See id.* at 37.

241. *Id.* at 35; *see also* Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d

instead suggests that observers would not perceive this religious reference "as signifying a government endorsement of any specific religion, or even of religion over non-religion."[242] Thus, her use of "ceremonial deism" seems to indicate that religious terms are being used in a way which does not constitute an endorsement rather than that the terms have lost all religious significance.

Justice O'Connor emphasizes that the Pledge does not attempt to single out the belief of a particular religion, for example, by referring "to a nation 'under Jesus' or 'under Vishnu,' but instead acknowledges religion in a general way: a simple reference to a generic 'God.'"[243] She understands that this reference excludes some religions,[244] but concludes that the "phrase 'under God,' conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system."[245] Yet, this account of the purposes behind the inclusion of "under God" does not reflect the articulated purposes of those instrumental in modifying the Pledge.[246] Nor does Justice O'Connor's account capture the function of the phrase "under God," which is not merely to acknowledge religious beliefs but to affirm them.[247] Further, while that phrase may not favor any *single* belief system, it certainly favors certain belief systems over others.

According to Justice O'Connor, certain "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate

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247, 264 (3d Cir. 2003).

> Of course, we agree that her examples of "ceremonial deism" are not violations of the Establishment Clause. . . . But we do not think this is so because the phrases themselves have lost their religious significance. Indeed, it is hard to imagine that these two phrases invoking God would not be perceived as religious. . . . [T]he reasonable observer, aware of the history of these invocations of God, views the religious language as tempered by the secular meaning that has emerged over the passage of time; the overall effect is that the reasonable person would not perceive in these phrases a government endorsement of religion (despite the clear use of the word "God."

Id.; Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring) ("[A] court cannot deem any words to lose their meaning over the passage of time. Each term used in public ceremony has the meaning intended by the term."); Epstein, *supra* note 14, at 2166 ("And although oaths, the judicial invocation, "under God" in the Pledge of Allegiance, and the national motto seem fairly innocuous at first blush, they pack a powerful religious punch to both the most and the least devout members of the American population.").

242. *See Newdow II*, 542 U.S. at 36 (O'Connor, J., concurring).

243. *Id.* at 42.

244. *Id.* ("Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being.").

245. *Id.*

246. *See supra* notes 186-92 and accompanying text.

247. *See supra* notes 132-36 and accompanying text (discussing what the Pledge means when affirmed by someone).

secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[248] Because such acknowledgments have this secular purpose and "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."[249] O'Connor argues that the "constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes."[250] Such an understanding develops over time and can only occur when the practice at issue is widespread.[251]

Yet, even if Justice O'Connor is correct that government acknowledgment of religion can serve those secular purposes, a separate question is whether the "under God" phrase in the Pledge can plausibly be thought to be performing that function. At issue here is a pledge made by children daily rather than, for example, a graduation which occurs but once a year.[252] The function of the phrase within the Pledge is not to express confidence about the future or to make judgments about what is and is not worthy in society. Instead, it is to describe a belief of the person making the pledge.[253] Precisely because of the phrase's testimonial quality, one cannot plausibly describe "under God" as merely serving the secular purposes which Justice O'Connor describes.

Justice O'Connor offers four factors to help determine whether a practice falls into the ceremonial deism category:

a. History and ubiquity;[254]
b. Absence of prayer or worship;[255]
c. Absence of reference to particular religion;[256] and
d. Minimal religious content.[257]

Professor Laycock suggests that one lesson to be learned from Justice O'Connor's first factor is that it "confines her opinion to a rather short list of existing practices that have long gone unchallenged."[258] Of course, there have been many challenges to the Pledge, including *Barnette*, which establishes the right not to say the Pledge.[259] While it is fair to say that there have been

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248. Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

249. *Id.*

250. *Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

251. *See id.* at 37 ("That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous.").

252. For a discussion of why this might be relevant, see *infra* notes 335-36 and accompanying text (comparing *Lee* and a hypothetical Pledge case).

253. *See supra* notes 132-36 and accompanying text.

254. *See Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

255. *Id.* at 39.

256. *Id.* at 42.

257. *Id.*

258. Laycock, *supra* note 133, at 232.

259. *See supra* notes 80-107 and accompanying text (discussing *Barnette*).

relatively few constitutional challenges to the Pledge since *Barnette*, that may not be because individuals have understood the Pledge to be secular but instead because they have thought that they would be unable to successfully challenge the invocation of God's name in the Pledge where they, themselves, were not being forced to participate.

Justice O'Connor's second factor questions whether there is prayer or worship involved. Certainly, she is correct that the Pledge is not itself a prayer,[260] although that hardly immunizes the Pledge from constitutional invalidation. As Justice Thomas notes, the "Court has squarely held that the government cannot require a person to 'declare his belief in God.'"[261]

In *Wallace v. Jaffree*,[262] the Court discussed the "established principle that the government must pursue a course of complete neutrality toward religion."[263] The Court's comments could easily have been written in the context of discussing whether the addition to the Pledge of only two words—"under God"—is constitutionally significant. The *Wallace* Court noted,

> The importance of [the neutrality] principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion."[264]

Where government intends to convey its approval or disapproval of religion, the First Amendment is violated. Thus, merely because the Pledge is not a prayer as such does not mean that it cannot violate constitutional guarantees.

Justice O'Connor's third factor, which examines whether there has been a reference to a particular religion, seems to understate the relevant requirement. Given that the "touchstone for [the Court's] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion,'"[265] one would expect that it

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260. *See Newdow II*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment) ("[T]he relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship."); Laycock, *supra* note 133, at 232 ("Justice O'Connor's second factor is 'Absence of worship or prayer.' She quite plausibly found the Pledge to be neither.").

261. *Newdow II*, 542 U.S. at 48 (Thomas, J., concurring) (citing Torasco v. Watkins, 367 U.S. 488, 489 (1961)); *see also* Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 410 (4th Cir. 2005) (Motz, J., concurring) ("First, a pledge to a country "under God" might be regarded as religious activity. Certainly, the Supreme Court has clarified that prayer is not the only religious activity with which the First Amendment is concerned.").

262. 472 U.S. 38 (1985).

263. *Id.* at 60.

264. *Id.* at 60-61.

265. McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas,

would be impermissible to favor some religions over others. As Justice O'Connor herself notes, the Pledge does do that.[266] But if that is so, the Establishment Clause guarantees are being ignored. It is not at all clear that the Pledge is saved because it refers to God rather than Vishnu or Jesus.[267] Further, as Justice Kennedy points out, atheists may well not feel particularly welcome while the Pledge is said.[268]

Justice O'Connor's fourth factor is that there be a minimal reference to religion. She argues that the "reference to 'God' in the Pledge of Allegiance qualifies as a minimal reference to religion; respondent's challenge focuses on only two of the Pledge's 31 words."[269] Yet, what might seem like a minimal reference to one individual might not seem minimal to another. As Professor Laycock points out, many religious individuals believe the Pledge sufficiently suffused with religious content that they would be very angry were that content deleted, while many non-religious people feel the Pledge is sufficiently suffused with religious meaning that they are angry about the reference to God being retained.[270] For many individuals, the reference to religion in the Pledge is not merely minimal.[271]

A brief examination of the Pledge litigation through *Barnette* helps illustrate that Justice O'Connor's claim that this is a minimal reference to religion simply is not credible.[272] While the state courts had consistently maintained that the Pledge was patriotic rather than religious, the *Gobitis* Court recognized the religious implications of the Pledge even when it did not contain the words "under God."[273] It is difficult indeed to understand how adding the words "under God" would not make the Pledge implicate religion even more. It is a separate issue whether the Pledge's constitutionality can be upheld even if its religious

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393 U.S. 97 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947)).

266. *Newdow II*, 542 U.S. at 42 (O'Connor, J., concurring) ("Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being.").

267. *See* Newdow v. U.S. Congress (*Newdow I*), 328 F.3d 466, 487 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004) ("A profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion.").

268. County of Allegheny v. ACLU, 492 U.S. 573, 603 (Kennedy, J., concurring in part and dissenting in part).

269. *Newdow II*, 542 U.S. at 43 (O'Connor, J., concurring).

270. *See* Laycock, *supra* note 133, at 233 ("The most committed believers and the most committed nonbelievers are thus united in taking the religious language of the Pledge seriously.").

271. *Cf.* Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) ("The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views.").

272. *See supra* notes 18-107 and accompanying text (discussing the case law through *Barnette*).

273. *See supra* note 71 and accompanying text.

nature is recognized,[274] but the religious implications of the words "under God" should not be denied.[275]

Ceremonial deism should be distinguished[276] from the view that some violations of the Establishment Clause are so inconsequential that they should be viewed as "de minimis"[277] and hence not constitutionally barred.[278] While some might claim that the Pledge should be so viewed, that is not the position taken by Justice O'Connor.[279] Further, the Court has not been sympathetic to de minimis

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274. *See, e.g.*, Berg, *supra* note 208, at 68 ("[I]f this argument is correct, 'under God' can be upheld without implausibly viewing it as merely a historical or ceremonial reference and stripping it of its religious meaning.").

275. Some would deny that "one nation under God" involves a religious belief. *See, e.g.*, Newhouse, *supra* note 208, at 404. Yet, presumably, it is difficult to deny that the implicit statements, for example, that there is one God and that this nation is under that God are religious in nature.

276. *But see* Laycock, *supra* note 133, at 223-24 ("'Ceremonial deism' has been another label for this de minimis exception.").

277. Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 493 (9th Cir. 2003) (Fernandez, J., concurring and dissenting), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004) ("I cannot accept the eliding of the simple phrase 'under God' from our Pledge of Allegiance in any setting, when it is obvious that its tendency to establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis."); *but see* Laycock, *supra* note 133, at 224 ("No matter how the Court defines a de minimis exception, it would be hard to fit the Pledge of Allegiance within it."); Thompson, *supra* note 10, at 586 ("To say that the impact of the religious language in the Pledge is de minimis ignores its potential impact. 'Under God' may be only two words, but they reflect a pervasive pattern of government behavior that suppresses the development of atheistic and nontheistic beliefs. The words limit, rather than promote, religious pluralism."); *see also* Epstein, *supra* note 14, at 2168 ("It is all too simple for those in the religious mainstream to argue that pledging allegiance to a nation 'under God,' whose motto is 'In God We Trust,' produces at most a de minimis endorsement. The magnitude of the endorsement, however, is enhanced significantly for those for whom 'God' has either no meaning or a meaning wholly inconsistent with strongly held religious beliefs.").

278. *See* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 521 (1992) ("One way to reconcile these instances of 'de facto establishment' [including the Pledge] with the principle of non-establishment is to call them 'de minimis.'").

279. *Newdow II*, 542 U.S. at 36-37 (O'Connor, J., concurring) ("There are no *de minimis* violations of the Constitution-no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of 'ceremonial deism' most clearly encompasses such things as the national motto ('In God We Trust'), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ('God save the United States and this honorable Court.'). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all." (internal citation

claims in the Establishment context. As the Court suggested in *School District of Abington v. Schempp*,[280] "[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ."[281]

Justice O'Connor's Endorsement Test is attractive, at least in part, because it takes into account the views of religious minorities, seeking to assure that state practices do not make them feel like second-class citizens. Yet, built into this test is an analysis of what a reasonable person would feel, and Justice O'Connor sometimes implies that a reasonable, knowledgeable individual could only have one reaction,[282] as if a reasonable evangelical and a reasonable atheist would react in the same way to the inclusion or exclusion of particular words such as "under God" in the Pledge. It would be much more plausible to believe that the reasonable atheist and the reasonable evangelical, even with all of the relevant knowledge,[283] would have opposite reactions to the deletion of the words "under God" from the Pledge, although they might well agree that such language is in fact religious.[284]

Another difficulty with the Endorsement Test's reliance on the reasonable person is that the state action at issue may be directed to children rather than adults. The question then becomes whether one should be discussing what the informed reasonable elementary or high school child would think.[285] Courts have had some difficulty in applying the reasonable person standard when schoolchildren[286] are the target audience.[287] Yet, if a primary school policy is at

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omitted)).

Some commentators suggest that O'Connor's position would have been more credible had she subscribed to the "de minimis" view. *See* Laycock, *supra* note 133, at 235 ("Justice O'Connor would surely have done better to concede that observances within the de minimis exception are religious, and to simply say that she viewed them as so nearly harmless that the Court should not interfere.").

280. 374 U.S. 203 (1963).

281. *Id.* at 225.

282. *Newdow II*, 542 U.S. at 40 (O'Connor, J., concurring) ("But, as I have explained, the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship.").

283. *See supra* notes 228-31 and accompanying text (discussing quanta of knowledge).

284. Laycock, *supra* note 133, at 233 ("The most committed believers and the most committed nonbelievers are thus united in taking the religious language of the Pledge seriously.").

285. *Cf.* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("[A]n objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.").

286. Skoros v. City of New York, 437 F.3d 1, 24 (2d Cir. 2006) ("[W]e do not attempt to cast schoolchildren of widely varying ages and religious backgrounds in the role of one or more reasonable objective observers.").

287. *See, e.g.*, *id.* at 23 ("We cannot conclude that it makes . . . sense to treat a first or second

issue, it is not at all clear why the relevant concern would be how a very knowledgeable adult observer would react to a practice which was being used to instill particular religious beliefs within impressionable and malleable schoolchildren.

On any plausible understanding of the Endorsement Test,[288] requiring the recitation of the Pledge as currently constituted in primary and secondary schools cannot pass constitutional muster. Justice O'Connor's protestations to the contrary, both knowledgeable reasonable adults and knowledgeable reasonable children might see the current Pledge as endorsing particular religious beliefs. If that is all that is required to violate the Establishment Clause, then the Pledge does not pass constitutional muster.

D. The Coercion Test

An alternative to the Endorsement Test has been proposed by Justice Kennedy, namely, the Coercion Test.[289] That test would seem to permit much more than the Endorsement Test, which seems to be why some on the Court have embraced it[290] and why others believe that it will greatly dilute Establishment Clause protections.[291]

One of the criticisms sometimes made of the Endorsement Test is that it cannot account for all of the practices that the Court has upheld. For example, Justice Kennedy has pointed out that legislative prayer fails the Endorsement

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grader as the 'objective observer' who can take account of the text, history, and implementation of a challenged policy.").

288. Some commentators have noted that the endorsement test has indeterminate results and thus might be thought to permit state action which even the coercion test would not. *See* Kevin P. Hancock, Comment, *Closing the Endorsement Test Escape-Hatch in the Pledge of Allegiance Debate*, 35 SETON HALL L. REV. 739, 741-42 (2005) (noting Justice O'Connor's suggestion that the Pledge passed muster under the endorsement test even though it presumably would not pass the coercion test).

289. *See* County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise . . . .").

290. Some on the Court embrace a very narrow notion of what would constitute coercion for Establishment purposes. *See* Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) ("[O]ur task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses. The Framers understood an establishment 'necessarily [to] involve actual legal coercion.'" (quoting Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 52 (2004) (Thomas, J., concurring) (alteration in original))).

291. *Allegheny*, 492 U.S. at 609 ("Thus, when all is said and done, Justice Kennedy's effort to abandon the 'endorsement' inquiry in favor of his 'proselytization' test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases. We choose, however, to adhere to the vigilance the Court has managed to maintain thus far, and to the endorsement inquiry that reflects our vigilance.").

Test[292] and, indeed, that many practices currently accepted would be held unconstitutional on any principled application of the Endorsement Test.[293] He suggests that the Coercion Test, coupled with another test involving aid to religion, more accurately reflect the relevant jurisprudence.[294]

Justice Kennedy explains that coercion does not only involve "a direct tax in aid of religion or a test oath."[295] He notes, "Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. . . . [F]or example, . . . the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall."[296] However, in most cases, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[297] Thus, Justice Kennedy suggests, unless the state is somehow coercing those who disagree to do something which violates their beliefs, most cases involving the accommodation of religious beliefs will not violate Establishment Clause guarantees.

Justice O'Connor has criticized the Coercion Test because she does not believe that it would "adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."[298] Of course, figuring out whether a particular test offers adequate protection requires some notion of first, what the Coercion Test protects,[299] and second, what would count as adequate protection. As will be made clear in the next section, the Coercion Test is much more protective in some settings than others.

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292. *Id.* at 673-74 (Kennedy, J., concurring in part and dissenting in part) ("Even accepting the secular-solemnization explanation at face value, moreover, it seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm.")

293. *Id.* at 674 ("Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.").

294. *See id.* at 659 ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (alteration in original)).

295. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

296. *Id.*

297. *Id.* at 662.

298. *Id.* at 628 (O'Connor, J., concurring).

299. For further discussion of what constitutes coercion, see *infra* notes 301-38 and accompanying text.

E. The School Setting

While the Coercion Test as a general matter may offer a much less strict Establishment hurdle than either the *Lemon* Test or the Endorsement Test, that same test is still more protective in particular contexts. Indeed, the Coercion Test may be as protective as the Endorsement Test, if not more so, in a school setting, if only because the Court treats the primary and secondary school setting as one which has the potential to be especially coercive.[300]

At issue in *Lee v. Weisman*[301] was whether a school's inclusion of "clerical members who offer[ed] prayers as part of the official school graduation ceremony [was] consistent with the Religion Clauses of the First Amendment."[302] A rabbi had delivered an invocation[303] and benediction[304] that seemed to reflect

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300. *See infra* notes 310-12, 331 and accompanying text (discussing the heightened concerns implicated in the primary and secondary school setting).

301. 505 U.S. 577 (1992).

302. *Id.* at 580.

303.

> INVOCATION
>
> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> AMEN

Id. at 581-82.

304.

> BENEDICTION
>
> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> AMEN

Id. at 582.

the school policy that they be composed with inclusiveness and sensitivity and that they be nonsectarian.[305]

The Court struck down the policy at issue, offering several reasons. First, the Court noted that with respect to "those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma."[306] Further, the Court suggested, "[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[307]

The petitioners had asked the Court "to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint."[308] However, the Court rejected the invitation, instead suggesting, "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . . ."[309]

The Court noted that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,"[310] worrying that "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[311] Indeed, the Court worried that nonconsenting students might feel coerced into giving apparent approval of a message which they did not believe.

> The . . . school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not

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305. *See id.* at 581.

306. *Id.* at 586.

307. *Id.* at 587 (citing Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (alteration in original).

308. *Id.* at 589.

309. *Id.*

310. *Id.* at 592. Some commentators argue that primary and secondary school students are relevantly dissimilar and, thus, the constitutional issues implicated when discussing each group should be viewed separately. *See* Martin Guggenheim, *Stealth Indoctrination: Forced Speech in the Classroom*, 2004 U. CHI. LEGAL F. 57, 70 ("But not all age groups of children are alike, and what may be impermissible for adolescents may be acceptable for primary school-age children.").

311. *Lee*, 505 U.S. at 592.

> allow, the injury is . . . real. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.[312]

It might be argued that students voluntarily attend graduation and thus are not being coerced into doing anything—if religious invocations or benedictions offend them, they can simply choose not to attend. However, the Court rejected this approach, suggesting that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."[313] Indeed, the Court contrasted this setting to a session of a state legislature, where adults might leave freely,[314] thereby suggesting that upholding the legislative prayer in *Marsh v. Chambers*[315] was perfectly compatible with striking the benediction and invocation at issue in *Lee*. By the same token, the Court can strike down a policy mandating recitation of the Pledge in primary and secondary schools without needing to revisit the issue of legislative prayer.[316] It is precisely because of the importance of the context in which the action was occurring, namely, in school, that the Court could strike down a Pledge policy without being forced to revisit a whole host of practices that the Court has already suggested are constitutionally permissible.[317]

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312. *Id.* at 593.

313. *Id.* at 595.

314. *See id.* at 597.

315. 463 U.S. 783 (1983). For discussion of this case and its implications for Establishment Clause jurisprudence, see *infra* notes 342-61 and accompanying text.

316. An additional way to distinguish between legislative prayer and the issues implicated in a Pledge challenge would be to point out that legislative prayer has been an ongoing tradition since the founding of the country whereas recitation of the Pledge is of much more recent vintage. *See* Thompson, *supra* note 10, at 580 ("Of course, unlike legislative prayer, the Pledge of Allegiance did not exist at the time of the framing of the Constitution . . . .").

317. Some jurists and commentators seem not to appreciate this point. *See, e.g.*, Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 473 (9th Cir. 2003) (O'Scannlain, J., dissenting from the denial of rehearing en banc), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004).

> If reciting the Pledge is truly "a religious act" in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem. Such an assertion would make hypocrites out of the Founders, and would have the effect of driving any and all references to our religious heritage out of our schools, and eventually out of our public life.

Id. (footnotes omitted); *id.* at 492-93 (Fernandez, J., concurring and dissenting).

> [U]pon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public

The fact that *Lee* might have implications for the Pledge of Allegiance did not go unnoticed by members of the Court. In his *Lee* dissent, Justice Scalia noted:

> [S]ince the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? . . . Logically, that ought to be the next project for the Court's bulldozer.[318]

Of course, *Lee* left some questions unanswered. For example, it might be argued that it was crucial in *Lee* that the benediction and invocation were delivered by a member of the clergy. Yet, the Court subsequently made clear in *Santa Fe Independent School District v. Doe*[319] that this would be a misunderstanding of the jurisprudence. In *Doe*, the Court struck down a policy whereby a student elected by the student body would deliver a "statement or invocation"[320] prior to home football games, the purpose of which was "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[321] Here, the Court noted that a "religious message is the most obvious method of solemnizing an event"[322] and inferred that "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[323]

The *Doe* Court focused on the "religious messages"[324] that would be delivered at home football games—the Court was not limiting its decision to a case involving religious prayers.[325] The Court was concerned that various

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> settings. "God Bless America" and "America The Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth. And currency beware!

Id. (footnotes omitted); Berg, *supra* note 208, at 45 ("Tradition and precedent make it very unlikely that all [the] invocations of God [listed by Justice O'Scannlain] are unconstitutional.").

318. *Lee*, 505 U.S. at 639 (Scalia, J., dissenting).

319. 530 U.S. 290 (2000).

320. *Id.* at 306.

321. *Id.*

322. *Id.*

323. *Id.* at 308.

324. *Id.* at 316.

325. Thus, the Court does not require that the religious activity be similar to what was at issue in *Lee* in order for the Establishment Clause to be violated. Some commentators seem not to appreciate this. *See* Newhouse, *supra* note 208, at 404 ("Even conceding for the sake of argument

individuals do not attend these games voluntarily. "There are some students . . . such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit."[326] Yet, even if attendance were purely voluntary, that would not have saved the practice at issue. The *Doe* Court explained, "Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[327]

Lee and *Doe* together have important implications for a school policy mandating that the Pledge of Allegiance be recited in school, since children are especially vulnerable in that setting.[328] Indeed, the *Gobitis* Court recognized that children are especially impressionable, which was one of the reasons that it *upheld* the Pledge requirement in school,[329] although it bears repeating that the Pledge at issue in *Gobitis* did not contain the words "under God."[330] The *Aguillard* Court suggested that the school setting requires special vigilance because "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[331]

The kind of coercion at issue in *Lee* and *Doe* cannot be understood to be legal coercion—rather, what is at issue is a form of psychological coercion,[332] which covers much more than would legal coercion.[333] Further, that students were permitted to remain respectfully silent rather than participate did not cure

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that the statement is a profession of a religious belief, it certainly does not rise to the level of state-sponsored formal religious exercise that would make it unconstitutional under *Lee*.").

326. *Doe*, 530 U.S. at 311.

327. *Id.* at 312.

328. Yannella, *supra* note 180, at 89 ("The facts are on the side of the Ninth Circuit insofar as the Pledge of Allegiance involves schoolchildren, a group that the Supreme Court has stated are uniquely susceptible to the subtle persuasion of government endorsed prayer."); Thompson, *supra* note 10, at 566-67 ("*Lee* is especially apropos because, like *Newdow*, it involved schoolchildren, whom the Supreme Court had found particularly susceptible to government coercion.").

329. *See supra* notes 74-75 and accompanying text.

330. *See* McKenzie, *supra* note 12, at 396 (noting that both *Gobitis* and *Barnette* were decided before the words "under God" were added to the Pledge).

331. Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

332. Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 454 (1995) ("[T]he majority opinion in Weisman . . . rests . . . on equating psychological coercion with legal coercion in the public school setting."); *see also id.* at 471 ("Even if the action of nonparticipation cannot be equated with a declaration of disbelief, students undoubtedly feel strong pressure not to opt out, if only for fear of being branded as weirdos or losers or otherwise ostracized.").

333. Thompson, *supra* note 10, at 567 (noting that the *Lee* Court employed "a broad concept of coercion").

the constitutional difficulty in *Lee*.[334] Indeed, there are a variety of respects in which it would seem easier to uphold what was at issue in *Lee* than what would be at issue in a Pledge case, since the former occurs but once a year while the latter involves a daily event.[335] As Justice Thomas explained in his *Newdow II* concurrence:

> Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.[336]

By the same token, the hypothesized Pledge scenario would seem at least as coercive as what was at issue in *Doe*,[337] if only because of the relative frequency of the occurrences. Further, it would not be surprising were students subjected to a variety of pressures were they to consistently refuse to make the Pledge.[338]

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334. Berg, *supra* note 208, at 50-51 ("If a broad understanding of coercion applies to graduation, it applies even more strongly to the Pledge, whose recitation occurs in school classrooms, where the Court says the risk of compulsion is the highest. Moreover, as in *Weisman*, it might be insufficient for an objecting student to simply fall silent during 'under God' because other students might take her to be approving the whole Pledge including that phrase." (footnote omitted)); Gey, *supra* note 134, at 1894 ("In this respect, *Newdow* and *Lee* are indistinguishable. If the ability to sit silently and unobtrusively in a graduation ceremony fails to render that claim trivial, then the same is true of a claim arising from a classroom of students saying the Pledge."); Greene, *supra* note 332, at 469 ("Giving students the option not to participate in group utterances is insufficient, for the very existence of a government-led group utterance in public school is sufficiently coercive to violate either the Establishment Clause or the Free Speech Clause.").

335. *Cf.* Hancock, *supra* note 288, at 787 ("But at the least, forcing the Court to somehow explain away the rationale of Lee while upholding 'under God' may expose the hypocrisy of claiming that a one-time prayer containing secular and religious messages can coerce a middle-school student, but yet a daily Pledge containing similar secular and religious messages cannot coerce a five-year-old.").

336. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 46 (Thomas, J., concurring in the judgment); *see also* Hancock, *supra* note 288, at 742 ("Any principled application of Lee's coercion test to Newdow's claim necessarily leads to the conclusion that the use of 'under God' in public schools is unconstitutional.").

337. *See* Gey, *supra* note 134, at 1896 ("It is impossible to seriously argue that the social pressure on a student in a classroom reciting the religious component of the Pledge is more trivial than the pressure imposed in graduation ceremonies and football games. Indeed, the pressure may be even greater in the Pledge case because dissenting students will be doubly ostracized: A student who refuses to recite the Pledge will be tainted as both unreligious and unpatriotic.").

338. *See, e.g.*, Sherman v. Cmty. Consol. Sch. Dist. 21, 758 F. Supp. 1244, 1250 (N.D. Ill. 1991) (citing R. Sherman Aff. ¶¶ 8, 10), *aff'd in part and vacated in part*, 980 F.2d 437 (7th Cir. 1992) ("Mr. Sherman states in his affidavit that his 'son has been knocked down by other children who are angered at his opposition to pledging' and that his son has suffered 'embarrassment and

The Court's special solicitude for protecting students in the school context helps explain why requiring the Pledge in that context cannot pass muster under the Coercion Test even if such a requirement could pass muster in a different context.[339] But this means that someone, such as Justice Kennedy, who believes that the Pledge passes muster as a general matter,[340] might nonetheless not believe that it passes muster when required in the primary school setting, even if there is an exception built in for those who object to saying it on political or religious grounds. The kind of coercion at issue in *Lee* and *Doe* which made those practices unconstitutional would be as strong if not stronger in a Pledge case,[341] and thus a Pledge requirement in a primary or secondary school would not pass the Coercion Test.

F. The Marsh *Exception*

This Article suggests that requiring recitation of the Pledge in primary or secondary schools violates the three Establishment Clause tests articulated by the Court—the *Lemon* Test, the Endorsement Test and the Coercion Test. However, before concluding that the issue therefore is resolved, another case must be considered.

In *Marsh v. Chambers*,[342] the Court upheld "the practice of opening legislative sessions with prayer."[343] The Court noted "the unambiguous and unbroken history of more than 200 years"[344] and reasoned that "opening legislative sessions with prayer has become part of the fabric of our society."[345] The Court reconciled its position with the Establishment Clause jurisprudence by saying, "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[346]

Marsh has been open to a variety of interpretations. Some read it as grandfathering long-established customs.[347] Others suggest that it provides an

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humiliation . . . when the pledge ceremony is conducted.'" (alteration in original)).

339. *See* Newdow v. U.S. Cong. (*Newdow III*), 383 F. Supp. 2d 1129, 1243 (E.D. Cal. 2005) ("It cannot be gainsaid that the practice of reciting the Pledge in the context of adults attending a school board meeting tenders a different question than the recitation of the Pledge in a classroom.").

340. See *infra* notes 349-51 and accompanying text for a discussion of Justice Kennedy's worry, expressed in his *Allegheny* concurrence and dissent, that the Court's approach would lead to invalidation of the Pledge.

341. *See supra* notes 335-38 and accompanying text.

342. 463 U.S. 783 (1983).

343. *Id.* at 792.

344. *Id.*

345. *Id.*

346. *Id.*

347. *See* Van Orden v. Perry, 545 U.S. 677, 688 (2005) (citing *Marsh*, 463 U.S. at 786) ("This

illustration of how repetition can secularize what might otherwise be considered religious.[348] Still others have suggested that it provides a standard for what the Establishment Clause must be thought to allow. For example, Justice Kennedy suggests in his *Allegheny* concurrence and dissent that:

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.[349]

Indeed, Justice Kennedy worries that unless the Court adopts this broad interpretation of *Marsh*, the Pledge of Allegiance may be in constitutional jeopardy.[350] With respect to the Endorsement Test in particular, he notes that

> by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." . . . [I] t borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.[351]

If Justice Kennedy is correct that practices with no greater potential for establishing religion than legislative prayer do not violate the Establishment Clause, then that Clause would not seem to do much work. Indeed, as other members of the Court have pointed out, Justice Kennedy's *Marsh* gloss on the Establishment Clause would basically nullify that clause. As the *Allegheny* Court noted, "Justice Kennedy's reading of *Marsh* would gut the core of the Establishment Clause, as this Court understands it. The history of this Nation,

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recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. Such a practice, we thought, was "deeply embedded in the history and tradition of this country." (footnotes omitted)).

348. Yannella, *supra* note 180, at 92 ("The Court can use *Marsh*, not simply for the proposition that context is critical, but to advance the proposition that sheer repetition of a phrase can dilute meaning.").

349. County of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part) (footnote omitted).

350. *Id.* at 602 ("In *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. Justice Kennedy, however, argues that *Marsh* legitimates all 'practices with no greater potential for an establishment of religion' than those 'accepted traditions dating back to the Founding.' Otherwise, the Justice asserts, such practices as our national motto ('In God We Trust') and our Pledge of Allegiance (with the phrase 'under God,' added in 1954) are in danger of invalidity." (citations omitted)).

351. *Id.* at 672-73 (Kennedy, J., concurring in part and dissenting in part) (quoting 36 U.S.C. § 172 (2000)).

it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically."[352] Thus, if historical practice were the only limitation set by the Establishment Clause, then the State not only could favor religion over non-religion but could also favor one religion over another.

Justice Scalia suggests that "with respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[353] However, as Justice Stevens points out, "[T]he original understanding of the type of 'religion' that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred 'monotheistic' religions Justice Scalia has embraced . . . ."[354] Lest it be thought that the Constitution therefore privileges Christianity, the *McCreary County* Court explained that "history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, *a fact that no Member of this Court takes as a premise for construing the Religion Clauses*."[355]

Marsh makes Endorsement Clause jurisprudence even more difficult to understand because it does not offer a principle upon which members of the Court can agree. Perhaps it can be limited to grandfathering those religious practices countenanced by the Framers on the theory that the Framers would not have engaged in practices which they knew violated the very Establishment Clause principle which they themselves had written into the Constitution.[356] Perhaps it does not even stand for that.[357] In any event, it adds a wild card to Establishment Clause jurisprudence. Precisely because the *Marsh* Court did not analyze the action before it in terms of the existing Establishment Clause tests[358]

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352. *Id.* at 604.

353. McCreary County v. ACLU, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

354. Van Orden v. Perry, 545 U.S. 677, 728-29 (2005) (Stevens, J., dissenting).

355. *McCreary County*, 545 U.S. at 880 (emphasis added).

356. *See* Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 404 (4th Cir. 2005) ("The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" (quoting Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (alteration in original)).

357. *See* Marsh v. Chambers, 463 U.S. 783, 814-15 (1983) (Brennan, J., dissenting).

> [T]he Court assumes that the Framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the clause. This assumption, however, is questionable. Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the Members of the First Congress as any other.

Id. (citations omitted).

358. *See id.* at 796 ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the

and did not offer a new test but nonetheless upheld a practice which appeared to fail the existing tests,[359] *Marsh* may be viewed by some as an exception to Establishment Clause jurisprudence[360] and by others as setting a new and very forgiving standard[361] by which to determine whether the Establishment Clause has been violated.

CONCLUSION

Arguably, a policy requiring recitation of the Pledge of Allegiance in primary and secondary schools is unconstitutional according to each of the Establishment Clause tests articulated by the Court. However, as the *Lynch* Court noted, "the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause,"[362] explaining that the Court has "refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.'"[363] Perhaps ironically, the *Lynch* Court justified its approach by claiming that in "our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."[364] Yet, the diversity of religious viewpoints in America would seem to support deleting "under God" from the Pledge so as not to alienate those with minority viewpoints on religious matters.[365]

Establishment Clause.").

359. *See id.* ("[T]he practice of official invocational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional. It is contrary to the doctrine as well [as] the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.").

360. *See id.* ("[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.").

361. *See* County of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part) ("*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." (footnote omitted)).

362. Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

363. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970)).

364. *Id.*

365. McKenzie, *supra* note 12, at 413.

> The demographic makeup of the United States is vastly different than it was when Congress last amended the Pledge in 1954. The Cold War is over and Americans no longer need to distinguish their cherished values from those they associate with communism. Additionally, Americans are more diverse in all aspects, including religion. Predictably, some of those who do not embrace monotheistic ideals object that

It is one thing to point out that "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case."[366] It is quite another when the Court fails to follow all of the tests that it has thus far articulated. Yet, ever since *Everson v. Board of Education*,[367] the Court's Establishment Clause jurisprudence has been far from consistent.

The *Everson* Court suggested, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[368] Yet, the Court itself has admitted that it has not consistently followed *Everson*. Indeed, the *Lynch* Court noted

> The metaphor [of a wall between church and state] has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.[369]

Thus, the *Lynch* Court suggests that *Everson* is not to be taken literally but instead is merely a reminder about what the Establishment Clause precludes. Yet, at other times, the Court has taken *Everson* quite seriously.[370] Further, members of the Court have occasionally wished that the *Everson* doctrine would be reinstated. For example, Justice Stevens worried that *Lemon* was too malleable and longed for the days of *Everson*—"Rather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*, I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the

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> their children are required to listen each day as their teachers proclaim that the United States is a "nation under God." It is time to amend the Pledge once more to accommodate the views of all Americans, so that school children are free to participate in an expression of patriotism without religious overtones.

Id.

366. Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring).

367. 330 U.S. 1 (1947).

368. *Id.* at 18.

369. *Lynch*, 465 U.S. at 673; *see also* Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Black, J., dissenting) ("Our insistence on 'a wall between Church and State which must be kept high and impregnable' has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere. With equal conviction and sincerity, others have . . . pledged continuous warfare against it." (footnotes omitted)).

370. *See* McDaniel v. Paty, 435 U.S. 618, 637 (1978) ("Our decisions interpreting the Establishment Clause have aimed at maintaining erect the wall between church and state."); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.").

First Amendment."[371]

One difficulty in predicting whether a particular policy will pass muster under the Establishment Clause is that the Court has articulated various tests and has never been clear about which to apply in particular situations. Yet another difficulty is that the Court has signaled that the Religion Clause Jurisprudence itself has to be understood in a particular way so that argumentation that in other areas of law might be persuasive or dispositive would nonetheless not win the day in this area of law. The *Sherman* court reasoned,

> [P]erhaps the rationale of *Barnette,* when joined with the school-prayer cases, equates social pressure with legal pressure. If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.
>
> As an analogy this is sound. As an understanding of the first amendment it is defective—which was Justice Kennedy's point in *Allegheny*. The religion clauses of the first amendment do not establish general rules about speech or schools; they call for religion to be treated differently.[372]

The *Sherman* court failed to make sufficiently clear the respect in which religion is to be treated differently. For example, one way in which a particular area of law might be treated "differently" is simply to use a test which is peculiarly suited to that area of law. That test would determine which acts pass muster and which do not, but because this test is used only in this particular area of law, this area is treated "differently" from others. Another way (suggested by the *Sherman* court) is to apply the relevant test (which may or may not be applicable in other contexts, e.g., in the context of free speech), but to reject that "failing the test" has the same implication in the Establishment Clause context as it does in others. It is as if the Court should not strike down a longstanding practice,[373] for example, even if the relevant test indicates that the practice cannot

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371. Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (citing *Everson*, 330 U.S. at 18) (citations omitted); *see also* Wolman v. Walter, 433 U.S. 229, 257 (1977) (Marshall, J., concurring in part and dissenting in part) ("I am now convinced that *Allen* [Board of Education v. Allen, 392 U.S. 236 (1968)] is largely responsible for reducing the 'high and impregnable' wall between church and state erected by the First Amendment to 'a blurred, indistinct, and variable barrier' incapable of performing its vital functions of protecting both church and state." (citations omitted)).

372. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444 (7th Cir. 1992) (emphasis added).

373. *See* Marsh v. Chambers, 436 U.S. 783, 796 (1983) (Brennan, J., dissenting) (describing *Marsh* as an exception for a longstanding practice). A separate question is how longstanding a practice must be before it falls into this exception. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 38 (2004) (O'Connor J., concurring) ("Fifty years have passed since the

be squared with the Constitution.

What will the Court do if a case comes before it in which the constitutionality of a primary school policy requiring daily recitation of the Pledge of Allegiance is at issue? One possibility would be for the Court to require that the Pledge be returned to its pre-1954 version.[374] Justice O'Connor noted that "the presence of those words [under God] is not absolutely essential to the Pledge, as demonstrated by the fact that it existed without them for over 50 years."[375] Her point was that even those objecting to the inclusion of those words "still can consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge."[376] Yet, *Doe* and *Lee* counsel that the state is not permitted to endorse religious beliefs merely because it is willing to permit those who disagree to remain respectfully silent. Thus, Justice O'Connor's point that the Pledge existed without "under God" for fifty years at least suggests that the Pledge could serve useful purposes even without "under God" included and that a reinstatement of the pre-1954 version might merit serious consideration.

It might be argued that the pre-1954 Pledge puts students who believe that the nation is under God at a disadvantage.[377] However, in his *Lee* concurrence, Justice Souter suggests:

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words 'under God' were added, a span of time that is not inconsiderable given the relative youth of our Nation.").

374. *Cf.* Ward, *supra* note 185, at 1638 ("[T]he words 'under God' were added in 1954 as a congressional afterthought. Not only can the Pledge exist independently of those two words, but it did so exist, as a purely patriotic exercise to which religious language was subsequently added during the Cold War for the political purpose of distinguishing American political culture from 'atheistic Communism.'").

375. *Newdow II*, 542 U.S. at 43 (O'Connor, J., concurring).

376. *Id.* (O'Connor, J., concurring); *see also* Berg, *supra* note 208, at 73 ("Note that the two kinds of dissenters to the Pledge may face unequal burdens. The student who objects to "under God" can still affirm loyalty to the nation by reciting most of the Pledge and simply staying silent for the two objectionable words.").

377. *See* Berg, *supra* note 208, at 73.

> Note that the two kinds of dissenters to the Pledge may face unequal burdens. The student who objects to "under God" can still affirm loyalty to the nation by reciting most of the Pledge and simply staying silent for the two objectionable words. But the theistic student who objects to the Pledge without "under God" cannot insert the phrase into the recitation if the prescribed words do not include it. It is more likely that this dissenter will have to opt out of the ceremony entirely—with attendant costs to the student herself (she may wish to affirm loyalty to the nation) and to her reputation with others. This, then, seems to be another argument for upholding the Pledge with "under God." The theistic student can silently affirm that the nation is under God; but such "mental reservations" have not been viewed as sufficient to excuse coerced speech. If they were, they could serve as an excuse in every case.

Id.

> Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, "burden" their spiritual callings. . . . Because they . . . have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion.[378]

By the same token, Justice Souter might suggest that students do not need the state to affirm their belief that the country is subordinate to God. Arguably, where the Pledge would neither affirm nor deny God's existence, the state would simply be remaining neutral on that question.

To some extent, the question is whether by omitting "under God" the State is offering a neutral position or, instead, one which is hostile to religion,[379] where no one is being forced to say the Pledge in any event.[380] However, were the Pledge modified to say, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all," it still would not be saying "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, *under no God*, indivisible, with liberty and justice for all."[381] To hold that the deletion of "under God" is the equivalent of saying "under no God" would mean that the Pledge could not help but either promote or undermine religion, which might mean that the Establishment Clause would bar its being said in public schools whether or not it included a reference to God.

One possibility would be for the Court to offer a hybrid Establishment Clause Test, for example, by combining the Endorsement and Coercion Tests.[382]

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378. Lee v. Weissman, 505 U.S. 577, 629-30 (1992) (Souter, J., concurring).

379. *Cf.* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.").

380. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

381. Thompson, *supra* note 10, at 594 ("But removing 'under God' is not the same as inserting 'under no God.' Removing 'under God' seems to be the best, if not the only, way to truly accommodate religious pluralism. Often the only way not to express a preference is to remain silent.").

382. *See, e.g.*, Ward, *supra* note 185, at 1665-66.

> This suggests a two-step structure to the analysis of state action under the Establishment Clause. In a first, threshold inquiry, the Court asks whether the challenged state action is either directly or indirectly coercive under the coercion test as conceptualized above. If the answer to that initial inquiry is "yes," then the state's action is unconstitutional and no further inquiry is necessary. If the answer to the coercion question is "no," then the Court proceeds to a second level of inquiry, under which it asks whether the challenged state action, although concededly not coercive, violates the endorsement test by creating political hierarchies based on religion. . . . Would a reasonable observer

But a much more likely possibility would be for the Court to adopt a standard which would be more lax with respect to the kinds of religious messages that might be sent by the State without offending constitutional guarantees.[383] Yet another possibility is that the Court will continue to eschew an approach using one or even a few principles, instead opting for a case-by-case approach that requires "the exercise of legal judgment."[384]

Ironically, some believe that the best basis for affirming the constitutionality of the Pledge is that numerous Justices have so intimated in dicta.[385] Yet, especially in the context of deciding this particular issue, a survey of past dicta may not yield a reliable result. In his *Barnette* dissent, Justice Frankfurter noted, "What may be even more significant than this uniform recognition of state authority is the fact that every Justice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned."[386] Thus, in the case of the Pledge, past declarations of the Pledge's constitutionality provide no guarantee that it will be so found in the future, especially if the issue is the constitutionality of its required recitation in primary schools.

It is very difficult to predict whether the Court would uphold the constitutionality of a primary school Pledge requirement, much less whether it would modify the existing jurisprudence. However, one can predict with some confidence that should the Court actually reach the merits, one or more Justices will invoke the *Lemon* Test (if only because the purpose behind amending the

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> conclude that the state, by engaging in the challenged action, has demonstrated partiality either toward or against religion, or toward or against a particular religion? If so, the action is unconstitutional; if not, it is not.

Id.

383. Cf. Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 16 (2005) ("When Sandra Day O'Connor announced her resignation on July 1, and with her vote being the fifth to affirm the Lemon test and the symbolic endorsement approach, it is apparent that worse may happen quite soon.").

384. *See* Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J. concurring) ("If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment."); *see also* Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 825 (1999) ("The Establishment Clause does not lend itself to a 'Grand Unified Theory.' Rather, it charges the courts with delineating the boundaries between church and state over time. This is an arena where lamentations over inconsistent doctrine are beside the point." (footnote omitted)).

385. Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 411 (4th Cir. 2005) (Motz, J., concurring) ("[T]he Justices of the Supreme Court have stated, repeatedly and expressly, that the Pledge of Allegiance's mention of God does not violate the First Amendment. I would affirm the district court's judgment solely on the basis of this considerable authority.").

386. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 664-65 (1943) (Frankfurter, J., dissenting).

Pledge was so clearly religious),[387] one or more will invoke the Endorsement Test, and Justices will disagree among themselves as to whether requiring non-participating students to listen respectfully to the Pledge is coercive. Further, one or more Justices will play the *Marsh* wild card, wondering how legislative prayer can be upheld if something as innocuous as including "under God" in the Pledge could somehow be viewed as unconstitutional even in the primary school setting. The Court will be divided, and either the majority[388] or the dissent[389] will accuse one or more Justices of being hostile to religion. Those charges will be denied,[390] perhaps accompanied by the suggestion that those making such an accusation assume either that a respect for pluralism is somehow hostility to religion[391] or that a refusal to support religion must be equated with hostility to religion.[392] The Court will be divided with respect to the correct test to use and whether the relevant test establishes the constitutionality or unconstitutionality of the policy at issue. Perhaps the only matters about which one can be very confident are that the separate opinions will manifest hostility to one or more views expressed in the opinion and that the time when the Court can present a coherent test for determining whether the Establishment Clause has been violated will have to wait for another day.

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387. *Cf.* McCreary County v. ACLU, 545 U.S. 677, 900-01 (2005) (Scalia, J., dissenting) (discussing the Court's application of *Lemon*).

388. Mitchell v. Helms, 530 U.S. 793, 827-28 (2000) ("[I]t is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously . . . .").

389. County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) ("The majority holds that the County of Allegheny violated the Establishment Clause by displaying a creche in the county courthouse . . . . This view of the Establishment Clause reflects an unjustified hostility toward religion . . . .").

390. *Cf.* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 246 (1963) ("Inevitably, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. . . . Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of delineating hostility from neutrality in the closest cases."); *see also* Engel v. Vitale, 370 U.S. 421, 433-434 (1962) ("It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, or course, could be more wrong.").

391. *Allegheny*, 492 U.S. at 610 ("Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.").

392. *Id.* at 653 n.11 (Stevens, J., concurring in part and dissenting in part) ("The suggestion that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence.").

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NOTES

2002 AMENDMENT TO INDIANA FINANCIAL INSTITUTIONS TAX: HAS THE UNITARY PRINCIPLE BEEN ABANDONED IN FAVOR OF RELIANCE ON ECONOMIC NEXUS?

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INTRODUCTION

Effective January 1, 2002, the Indiana General Assembly amended the Financial Institutions Tax law to redefine the Indiana unitary group to include only those members of the unitary group transacting business in Indiana.[1] This change was considered minor and went largely unnoticed by commentators. However, tax planners within the banking industry did take notice. The law as amended presents two potential costly problems for the State. First, it opens the door to a dramatic increase in the number of entities able to engage the State in the constitutional challenges associated with the "physical presence" versus "economic nexus" debate.[2] Second, financial institutions have responded to the amendment by restructuring certain business transactions to take advantage of the potential to shelter income from the tax using a variety of pass-thru entities.

While the Indiana financial institutions tax has contained provisions that establish nexus based on economic activity since its enactment, it has also always contained a presumption that a financial institution and all of its subsidiaries constitute a unitary business.[3] A unitary business means that the operations and activities of all of the commonly controlled entities contribute to a single overall business enterprise.[4] Prior to the 2002 amendment, the tax was imposed on the apportioned income of all the members of the unitary business group without

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1. IND. CODE § 6-5.5-1-18(a) (2006).

2. The U.S. Supreme Court has yet to decide if a state may constitutionally impose an income, franchise, or excise tax on an entity with no physical presence in the state based solely on the entity's exploitation of the economic market provided by the state.

3. IND. CODE §§ 6-5.5-1-18, -3-1 (2006).

4. *See infra* Part II.D.

regard for separately formed legal entities or their in-state activity.[5] The Supreme Court has found this method of taxing a unitary business enterprise constitutional.[6] The majority of large non-resident financial institutions have been unable to mount a constitutional challenge to the economic nexus provisions in the statute because they have at least one subsidiary that has a physical presence in the State. That subsidiary provides a jurisdictional hook for the State to impose the tax on the apportionable income of the entire group without reliance on the economic nexus provisions.

The current law as amended excludes members of the unitary business enterprise that are not transacting business in Indiana, as defined in the statute, from the Indiana unitary group.[7] This runs contrary to the concept that the entire group is being taxed as a single business enterprise. As a result, Indiana will no longer be able to rely on the unitary concept to provide a jurisdictional hook for those members of the financial institution's unitary group without a physical presence in the State. The State will be forced to rely on the constitutionality of the economic nexus concept to include financial institutions and their subsidiaries that lack physical presence in the State, in the Indiana unitary group's apportionable tax base. If the economic nexus concept is found unconstitutional, the potential cost to the State is significant because most of the members of a non-resident financial institution's unitary group, particularly profitable credit card and mortgage operations, will not have a physical presence in Indiana.

The economic nexus concept is attractive to cash strapped states because it expands the state's taxing jurisdiction to include businesses that exploit the benefits of a state's economic market without maintaining an office, warehouse, inventory, employees or agents in the state.[8] This approach has gained popularity among states largely in response to the effort of businesses to restructure their operations to avoid state tax.[9] Businesses attempt to avoid state tax by shifting income to a subsidiary or pass-thru entity that has established a physical presence only in a state in which its income is not taxed.

It is unclear if the Supreme Court will endorse the economic nexus approach for income and franchise taxes in light of the bright line physical presence test mandated for sale/use taxes. Even in an age of e-commerce, the economic nexus approach is a significant expansion of the state's ability to tax interstate commerce. The Court may reject such an expansion in favor of the more limiting physical presence test given that the unitary business principle, already

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5. IND. CODE § 6-5.5-2-4 (2006).

6. *See generally* Allied-Signal, Inc. v. Dir. Div. of Taxation, 504 U.S. 768, 783 (1992) (reaffirming the constitutional test for a unitary business that focuses on functional integration, centralized management, and economies of scale); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 179 (1983); *see also infra* Part II.D.

7. IND. CODE § 6-5.5-1-18(a) (2006).

8. R. Todd Ervin, Comment, *State Taxation of Financial Institutions: Will Physical Presence or Economic Presence Win the Day?*, 19 VA. TAX REV. 515, 523-26 (2000).

9. *See infra* Part II.C.

established as permissible by the Court, provides states a fair method of taxing the income of such business enterprises.

Even if the economic nexus concept is declared constitutional, the State will still face restructured transactions that use pass-thru entities, such as Real Estate Investment Trusts (REITs), Regulated Investment Companies (RICs), and partnerships, to avoid the full impact of the tax. These loopholes appear to be the result of two provisions in the statute. The first provision fails to include the ownership of an interest in a pass-thru entity engaged in financing transactions in Indiana in the definition of transacting business in the State.[10] The second defines a taxpayer as a corporation for financial institutions tax purposes.[11] Financial institutions can move profitable operations into pass-thru entities, or several tiers of pass-thru entities, that are owned by holding corporations. The receipts from the pass-thru entities flow through to the holding corporations. While the holding corporations are defined as taxpayers, they are not transacting business in Indiana and therefore are not members of the Indiana unitary group. The pass-thru entities are not taxpayers under the statute's definition of that term.

The statute is somewhat ambiguous as to whether a pass-thru entity must be included as a member of the unitary group, or whether the corporate owners must report the income on a separate return. If the pass-thru entity is included in the unitary return, the apportionment percentage will be diluted because the statute provides that only the receipts of taxpayer members of the unitary group are included in the numerator, while the receipts of all members of the group are included in the denominator.[12] If the corporate owners report on a separate return, income from the unitary group is reported in a non-unitary fashion. This has the potential to distort the income apportioned to Indiana to the State's detriment. The problem is exacerbated when tiers of pass-thru entities are utilized as it may be possible for the pass-thru income to escape taxation entirely by using several tiers of pass-thru entities.

This Note explores, in Part I, the history of changes in the banking industry that led to the original enactment of the financial institutions tax and the subsequent 2002 amendment. Part II concentrates on the constitutional aspects of the economic nexus approach taken by the statute's definition of transacting business in the State. Finally, Part III focuses on the efforts of the banking industry to restructure transactions to avoid the financial institutions tax, as amended, through the use of a variety of pass-thru entities. This section includes a discussion of the options available to the State to respond to those efforts. In Part IV, this Note concludes that while the adoption of the economic nexus concept is an unnecessary expansion of the state's jurisdiction to impose tax, the financial institutions tax law is easily rehabilitated through either a return to the accepted method of applying the unitary business principle, or by altering the definition of transacting business in Indiana to include ownership of an interest in a pass-thru entity transacting business in Indiana and expanding the definition

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10. IND. CODE § 6-5.5-3-1 (2006).
11. *Id.* § 6-5.5-1-17(a).
12. *Id.* § 6-5.5-2-4.

of a taxpayer to include pass-thru entities.

I. HISTORY OF THE BANKING INDUSTRY

Historically, federal banking regulations have restricted financial institutions from physically locating in multiple states.[13] However, the regulations have never proscribed interstate banking transactions.[14] Banks were initially slow to take advantage of the opportunity to engage in interstate business transactions, largely due to consumers' demand for localized banking.[15] The proliferation of home computers, internet access and the use of unsecured credit, mostly in the form of credit cards, over the last thirty years have dramatically changed consumer expectations with respect to banking services.[16] Consumer demand has moved the provision of banking services away from traditional "bricks and mortar" locations in favor of remote banking via the Internet, mail or telephone.[17] As a result, financial institutions now provide a variety of products and services to customers throughout the U.S. without having a physical location in the state in which its customers are located.[18] It is now commonplace to apply for a mortgage, pay bills, obtain unsecured loans and manage savings, checking and retirement accounts from the comfort of home.

Changes in banking laws and the explosion of e-commerce have combined to produce a market for banks that did not previously exist.[19] The shift in banking laws ushered in an era of unprecedented consolidation within the industry in the 1990s. During that same period, e-commerce fueled customer demand for remote banking.[20] Large financial institutions realized that certain segments of their business, such as mortgage loans, consumer loans, and credit cards, which can be conducted without maintaining a physical location, could be operated by subsidiaries that would only have to report their income to one state-taxing jurisdiction, rather than the several states from which the income was derived. The Indiana financial institutions tax law was the legislature's response to this business climate.[21]

A. State Response to Changing Business Climate

While states have generally relied on the traditional nexus approach requiring a physical presence to impose tax on financial institutions, a few states have passed legislation that establishes nexus for out-of-state financial institutions

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13. Ervin, *supra* note 8, at 521.
14. *Id.*
15. *Id.* at 522.
16. *Id.*
17. *Id.*
18. *Id.* at 523.
19. *Id.*
20. *Id.* at 521-23.
21. Interview with Terry Griggs, Audit Adm'r, Ind. Dep't of Revenue, in Indianapolis, Ind. (Oct. 19, 2005) [hereinafter Griggs Interview].

based on "economic nexus."[22] "Economic nexus" bases the state's jurisdiction to tax an out-of-state financial institution on the institution's exploitation of the benefits of the state's economic market rather than its physical presence within the taxing state.[23] A financial institution's economic presence within a state is determined using factors such as the number of customers, the value of deposits or other intangible property, the receipts attributable to customers, and the value of the benefits provided by the institution which are consumed in the state.[24]

Indiana, Kentucky, Massachusetts, Minnesota, Tennessee, and West Virginia have all imposed a tax on financial institutions based on economic presence in the state.[25] The statutes passed in these states impose either an income, franchise or excise tax on financial institutions regularly engaging in business in the state.[26] Regularly engaging in business in the state is defined to include such activities as obtaining or soliciting business in the state, providing services the benefits of which are consumed in the state, the receipt of deposits from customers in the state, and receipts attributable to sources within the state.[27] Receipts attributable to sources within the state include income derived from making loans to customers in the state, making loans secured by property located in the state, and transactions involving intangible property that result in income flowing from within the state to the financial institution.[28] The conduct of the economic activities, without regard to physical presence, is sufficient to subject out-of-state financial institutions to the tax.

The Kentucky and West Virginia statutes both presume a financial institution is regularly engaged in business in the state if it obtains or solicits business from twenty or more persons or if receipts attributable to sources in the state exceed $100,000.[29] Indiana and Minnesota likewise have a twenty customer threshold, while Massachusetts' is one hundred.[30] Massachusetts' threshold for receipts attributable to the state is $500,000.[31] Indiana and Minnesota have a $5 million threshold for both assets and deposits, while Massachusetts has only a $10 million threshold on assets and Tennessee has a $5 million threshold on the sum of assets and deposits.[32]

Indiana, Minnesota, and Tennessee[33] have specifically enumerated certain

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22. JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 6.29[1] (3d ed. 2005), *available at* 1999 WL 1398893.

23. *Id.*

24. *Id.* at [2-3].

25. *Id.* ¶ 6.29.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. However, the state statute notwithstanding, the Tennessee Court of Appeals has held that the Commerce Clause prohibited the State from taxing an out-of-state credit card company that has

activities in their definition of transacting business in the state. These activities include directly or indirectly making, acquiring, servicing, and selling of loans either to customers in the state or that are secured by property located in the state; the sale of products and services in the state; providing services the benefits of which are consumed in the state; and engaging in transactions with customers in the state that result in income flowing from the state to the financial institution.[34]

Indiana's statute is unique because, in addition to the economic nexus provisions, it contains a presumption that financial institutions and their subsidiaries constitute a unitary business.[35] The "unitary business principle"[36] allows the income of entities without a physical presence in the taxing state to be combined with the income of those entities having traditional nexus in the state if the operation and activities of the entities form a single business enterprise.[37] A unitary business means that the business activities and operations of each entity are mutually beneficial, dependant on or contributory to transacting the business of the enterprise as a whole.[38] The unitary presumption allowed Indiana to include, in the apportionable base,[39] the income of all the subsidiaries and pass-thru entities owned by the financial institution without regard to the artificial boundaries represented by separately formed legal entities or in-state activity.[40] As a result, the State did not need to rely heavily on the economic nexus concept to generate the taxable base.

As federal banking regulations continued to evolve during the 1990s, regional banks complained that the financial institutions tax law put them at a competitive disadvantage with respect to large national financial institutions.[41] Notably, in 1994, the Riegle-Neal Interstate Banking and Branch Efficiency Act[42] removed the barrier to acquisitions and branching, allowing financial institutions to engage in nationwide interstate banking.[43] In response to the relaxation of federal banking regulations in the 1990s,[44] the Indiana General Assembly amended the financial institutions tax law to redefine the Indiana unitary group

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no physical presence in the State. J.C. Penney Nat'l Bank v. Johnson, 19 S.W.3d 831, 842 (Tenn. Ct. App. 1999); *see also infra* Part II.C.

34. HELLERSTEIN & HELLERSTEIN, *supra* note 22, ¶ 6.29[2-4].

35. *Id.* at [1]; *see* IND. CODE § 6-5.5-1-18(b) (2006).

36. *See infra* Part II.D.

37. Ashley B. Howard, Comment, *Does the Internal Revenue Code Provide a Solution to a Common State Taxation Problem?: Proposing State Adoption of § 367(D) to Tax Intangibles Holding Subsidiaries*, 53 EMORY L.J. 561, 571 (2004).

38. IND. CODE § 6-5.5-1-18(a) (2006).

39. The apportionable base is the total income to which the Indiana apportionment percentage will be applied to determine the portion of the income subject to tax in Indiana.

40. HELLERSTEIN & HELLERSTEIN, *supra* note 22, ¶ 8.07[2].

41. Griggs Interview, *supra* note 21.

42. Pub. L. No. 103-328, 101-03, 108 Stat. 2338 (1994).

43. Ervin, *supra* note 8, at 523-26.

44. Griggs Interview, *supra* note 21.

to include only those members transacting business in the State.[45]

II. CONSTITUTIONAL ANALYSIS

A constitutional challenge to the economic nexus provisions in the Indiana statute has not reached the courts despite numerous hearings on the issue at the administrative level that have uniformly ruled against financial institutions. While there are a few financial institutions, mostly credit card companies, whose unitary groups include no members with a physical presence in the State, none have challenged the statute.[46] The broad reach of the treatment of financial institutions and their subsidiaries as a unitary business is likely responsible for the reluctance of other financial institutions to seek relief from the statute. The 2002 amendment to the statute[47] has the potential to dramatically increase the number of financial institutions willing to expend the resources necessary for such a challenge.[48]

The 2002 amendment to the financial institutions tax statute has the effect of taxing only selected parts of the unitary business. While the amendment purports to change nothing more than the definition of the unitary group, what remains is, in substance, a consolidated return comprised of those members transacting business in Indiana. The Supreme Court has not endorsed taxing only selected parts of a unitary business. The Court's holdings concerning the unitary method of taxation reveals the opposite approach. The Court has consistently held that businesses could not remove selected pieces of income earned by a unitary business enterprise outside the state from the apportionable tax base of a state in which the unitary business has sufficient activity to support nexus.[49] Since the Indiana statute no longer relies on the unitary business concept, as established by the Supreme Court, to tax entities with no physical presence in the State, the economic nexus concept inherent in the statute's definition of transacting business in Indiana will trigger conflict as to the constitutionality of taxing those

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45. IND. CODE § 6-5.5-1-18(a) (2006).

46. One such credit card company has filed an appeal with the tax court challenging the economic nexus provisions of the statute as of the writing of this Note. MBNA Am. Bank, N.A. & Affiliates v. Ind. Dep't of State Revenue, No. 49T10-0506-TA-53, case docketed (Ind. Tax Ct., June 30, 2005). However, even this institution has independent contractors in the State. This company contracts with organizations, such as universities, to market credit cards in the State with the organization's logo on the card in return for a percentage of the card's receipts. These organizations provide applications and sometimes offer promotional incentives to induce customers in Indiana to sign up for the card.

47. IND. CODE § 6-5.5-1-18(a) (2006).

48. This is particularly so in light of the Tennessee court's refusal to uphold the taxation of a credit card business based solely on economic nexus under a substantially similar statute passed by its legislature. *See supra* note 33; *see also infra* Part II.C.

49. *See, e.g.*, Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983); Exxon Corp. v. Wisc. Dep't of Revenue, 447 U.S. 207 (1980); Mobile Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425 (1980).

entities included in the Indiana unitary group that do not have a physical presence in the State.

The Supreme Court has yet to decide the constitutional viability of the imposition of state taxes, other than sales tax, on entities conducting business in interstate commerce that have no physical presence in the taxing state.[50] Likewise, Congress's only guidance with respect to the taxation of business conducted in interstate commerce is a prohibition against imposing a tax on the sale of tangible goods in interstate commerce where the business has not exceeded mere solicitation in the taxing state.[51] It is against this backdrop that conflict has emerged among corporate America, tax planners, states, and even academia as to whether "physical presence" or "economic nexus" is the proper measure to determine the circumstances under which a state can constitutionally impose taxes based on income.

A. Origin of the Physical Presence Standard

The 1992 Supreme Court decision in *Quill v. North Dakota*[52] is cited as the starting point to resolve the quagmire that has developed in state taxation by proponents of both the economic nexus approach and the physical presence test. Quill was a business that sold office supplies by mail order.[53] Quill had a significant amount of sales in North Dakota, but had no office, employees or other physical presence in the State.[54] North Dakota sought to require Quill to collect the State's use tax on sales to customers in the State.[55]

The Court found that Quill did not have nexus in North Dakota for the purpose of requiring Quill to collect the tax.[56] In doing so, the Supreme Court reaffirmed the use of a bright line "physical presence" test to determine if a business' activities in a state would establish nexus for sales/use tax.[57] *Quill* also established that the nexus requirements under the Due Process Clause and the Commerce Clause were not equivalent because they did not address the same concerns.[58] Due Process seeks to ensure that a business has fair notice that a tax may be imposed.[59] It is based on the belief that it is fundamentally unfair for a

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50. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992) (declining to require physical presence to establish nexus for taxes other than sales taxes).

51. 15 U.S.C. § 381 (2000) provides that a state may not impose a net income tax on a person whose only business activity is the solicitation of orders approved and filled outside the state.

52. 504 U.S. at 298.

53. *Id.* at 302. Quill, a Delaware corporation, had almost $1 million in sales to over 3000 customers in North Dakota. *Id.*

54. *Id.*

55. *Id.* at 303.

56. *Id.*

57. *Id.* at 314.

58. *Id.* at 314-15.

59. *Id.* at 305.

state to impose tax on a business with no connection to the taxing state.[60] In contrast, the Commerce Clause seeks to prevent states from placing a burden on the national economy.[61] The Court found that Quill's exploitation of the economic market of North Dakota was sufficient to establish nexus under the Due Process "minimum contacts" standard.[62] However, the Court found that the Commerce Clause prohibited North Dakota from compelling Quill to collect the tax.[63]

The United States Supreme Court established the physical presence nexus requirement for sales/use tax in *National Bellas Hess, Inc. v. Department of Revenue of Illinois* in 1967.[64] The Supreme Court of North Dakota determined that *Bellas Hess* was no longer controlling[65] in light of the Supreme Court's 1977 decision in *Complete Auto Transit, Inc. v. Brady*.[66] The *Complete Auto* Court stated that "a state tax is unconstitutional only if the activity lacks the necessary connection with the taxing state to give 'jurisdiction to tax,' or if the tax discriminates against interstate commerce, or if the activity is subject to multiple taxation."[67] *Complete Auto* established a four-part test to determine the constitutionality of a state tax. The test required: 1) a business have a substantial nexus with the taxing state; 2) the tax be fairly apportioned; 3) the tax does not discriminate against interstate commerce; and 4) the tax is fairly related to the services provided by the state.[68] The *Quill* decision centered on the first prong of the *Complete Auto* test.[69]

The North Dakota Supreme Court concluded that the first prong of the *Complete Auto* test did not require a physical presence in the State emphasizing the evolution of the national economy and the law since the *Bellas Hess* decision.[70] However, the Supreme Court rejected North Dakota's reasoning. The *Quill* Court found that the *Complete Auto* analysis "reflects concerns about the national economy."[71] The Court explained that the first and fourth prongs of the *Complete Auto* test ensure that interstate commerce will not be unfairly burdened by requiring substantial nexus and a relationship between the services provided

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60. *Id.* at 312.

61. *Id.*

62. *Id.* at 308.

63. *Id.* at 313 (concluding the use tax statute provides an example of "how a state might unduly burden interstate commerce" if all "6000-plus taxing jurisdictions" imposed such a duty—the compliance burden would be significant).

64. *Id.* at 314; *see* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967).

65. *Quill*, 504 U.S. at 303-04.

66. 430 U.S. 274 (1977).

67. *Id.* at 280-81.

68. *Id.* at 279.

69. *Quill*, 504 U.S. at 311 (concluding that *Bellas Hess* "stands for the proposition that a vendor whose only contact with the taxing State are by mail and common carrier lacks the 'substantial nexus' required under the Commerce Clause").

70. *Id.* at 303.

71. *Id.* at 313.

by the taxing state and the entity sought to be taxed.[72] The second and third prongs require fair apportionment and non-discrimination to prevent interstate commerce from shouldering an undue portion of the tax burden.[73]

The Court found that the *Bellas Hess* physical presence test was consistent with the first prong of *Complete Auto*,[74] affirming that physical presence is necessary to establish substantial nexus under Commerce Clause for sales/use taxes.[75] The Court concluded that the retention of the physical presence test established in *Bellas Hess* was a "means for limiting state burdens on interstate commerce."[76] The Court further justified the preference for a "bright line test" on policy grounds, finding that the certainty provided by the test settled businesses' expectations, fostering investment in interstate commerce.[77] However, the Court declined to decide if the physical presence requirement applied to taxes other than sales/use taxes.[78]

In reaffirming the physical presence test for sales/use taxes, the Court expressed that had *Bella Hess* been decided at the time of *Quill* it might have been decided differently.[79] The Court noted that Congress has the ultimate power under the Commerce Claus to resolve the underlying issue and that Congress had chosen not to overturn *Bellas Hess*.[80] It has been suggested that the Court bifurcated the Due Process and Commerce Clause analysis to encourage Congress to legislate in this area.[81] Unmooring the Due Process requirement from the Commerce Clause requirement leaves Congress free to allocate the burdens as it sees fit; Congress has the sole power to regulate commerce between the states.[82] In any event, Congress has yet to accept the Court's invitation to legislate in this area.

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72. *Id.*

73. *Id.*

74. *Id.* at 311.

75. *Id.* at 317.

76. *Id.* at 313-14.

77. *Id.* at 316 (noting that the business community has relied on *Bellas Hess* in ordering their affairs and speculating that it is not unlikely that the dramatic growth in the mail-order industry is in part attributable to the bright-line exemption from state taxation in concluding a bright-line rule is more beneficial than a case by case review to determine nexus).

78. *Id.* at 314, 317 (noting that in cases subsequent to *Bellas Hess* concerning other types of taxes, no similar bright-line rule has been adopted).

79. *Id.* at 311 (finding that "contemporary Commerce Clause jurisprudence might not dictate the same result" if the issue were one of first impression today).

80. *Id.* at 318.

81. James L. Kronenberg, *A New Commerce Clause Nexus Requirement: The Analysis of Nexus in Quill Corp. v. North Dakota*, 1994 ANN. SURV. AM. L. 1, 27. Kronenberg suggests that the only justification for an independent nexus requirement is the desire to prompt Congress to legislate in this area. *Id.*

82. *Quill*, 504 U.S. at 318 (noting that since the Due Process concerns have been put to rest, Congress is free to legislatively overturn the *Bellas Hess* bright-line rule).

B. Business Response to the Physical Presence Test

The reaffirmation of the physical presence test in *Quill* fueled an explosion of corporate restructuring by multi-state business operations in the 1990s for the purpose of shifting income away from state taxation. The success of these restructuring schemes relies on the proposition that an entity must have a physical presence in a state before that state can impose a tax. The most prevalent form of corporate restructuring to successfully shift income beyond the reach of state taxing jurisdictions is an intangibles holding company.

Many multi-state corporations have either created or acquired valuable intangible assets, such as trade names, trademarks, and patents.[83] The estimated value of these intangibles for corporations such as Intel, GM and IBM is in the billions.[84] As a result of marketing by accounting firms, corporations with valuable intangible assets began transferring them to wholly owned subsidiaries incorporated in states such as Delaware that do not impose tax on the receipts from those intangibles.[85] The intangibles holding subsidiary then leases the use of the intangible back to the parent corporation in exchange for a royalty payment.[86] This arrangement results in: 1) large amounts of royalty expense being deducted by the parent corporation, which lowers the income reported to separate reporting states, and 2) correspondingly large amounts of royalty income earned by the subsidiary that is not taxable in any state or is taxed at an "acceptably low" rate.[87]

C. Emergence of the Economic Nexus Concept

Some states have seized on the opening left by *Quill* concerning the question of whether physical presence is necessary to establish the requisite nexus for income and franchise taxes in order to combat the revenue drain that resulted from these types of income shifting business structures.[88] These states contend that the intangibles holding subsidiary companies have established a nexus in the state based either on the benefits that the state's economic market has provided to the holding company, or the economic presence of the subsidiary's intangibles in the state.[89] However, the response from state courts to the "economic nexus" argument has not been uniform.[90] The Supreme Court has refused to grant

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83. *See generally* Giles Sutton & Todd Zoellick, *The Ins and Outs of Related Party Add-Backs, Tax Executive*, 57 TAX EXECUTIVE INST. 238 (2005), *available at* 2005 WLNR 12338438; *see also* Xuan-Thao N. Nguyen, *Holding Intellectual Property*, 39 GA. L. REV. 1155, 1162 (2005).

84. Nguyen, *supra* note 83, at 1162.

85. Howard, *supra* note 37, at 561-63.

86. *Id.* at 564.

87. *Id.* at 564-65.

88. *Id.* at 574; Ervin, *supra* note 8, at 534.

89. Ervin, *supra* note 8, at 534.

90. *See generally* Christine C. Bauman & Michael S. Schadewald, *More States Challenge Trademark Holding Companies*, 74 CPA J. 38 (Apr. 2004), *available at* 2004 WLNR 11368394 (providing a synopsis of the various states' responses to the subsidiary holding company structure

certiorari for these cases thus far.[91]

Geoffrey, Inc. v. South Carolina Tax Commission[92] is the most cited of the state court decisions that endorse the economic nexus theory. Geoffrey, Inc., a wholly owned subsidiary of Toys R Us, was incorporated in Delaware to hold and manage the intangible assets of Toys R Us.[93] Geoffrey licensed these intangibles to Toys R Us for a royalty fee based on a percentage of Toys R Us sales at retail locations throughout the country, including South Carolina.[94] South Carolina imposed a tax on Geoffrey's royalty income based on the utilization of Geoffrey's intangible assets within the State, despite the fact that it had no physical presence there.[95] The South Carolina Supreme Court easily found nexus under the Due Process Clause, as Geoffrey clearly had directed its business activity toward the market provided by South Carolina.[96] The court then distinguished *Quill* as applying only to sales taxes,[97] finding that the economic presence of Geoffrey's intangibles in the State provided the substantial nexus necessary under *Complete Auto* for the State to impose a tax on Geoffrey's income.[98]

Geoffrey has been widely criticized by tax practitioners, and some states have rejected the economic nexus theory.[99] The criticism stems from *Geoffrey's* failure to adequately address the Commerce Clause requirement.[100] The *Geoffrey* court's Commerce Clause analysis merely distinguished *Quill* as applicable only to sales taxes without advancing any reasoning for rejecting the physical presence standard for income taxes or attempting to establish any alternative standard.[101] Critics charge that *Geoffrey* collapsed the Commerce Clause analysis into the Due Process standard, notwithstanding *Quill's* pronouncement that a separate standard applies.[102]

North Carolina has followed *Geoffrey's* lead.[103] In *A & F Trademark, Inc.*

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generally and economic nexus specifically).

91. *See, e.g.*, Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13 (S.C.), *cert. denied*, 510 U.S. 992 (1993); A & F Trademark, Inc. v. Tolson, 605 S.E.2d 187 (N.C. Ct. App. 2004), *cert. denied*, 2005 U.S. LEXIS 6003 (2005).

92. 437 S.E.2d at 13.

93. *Id.* at 15.

94. *Id.*

95. *Id.* at 15-18.

96. *Id.* at 16-17.

97. *Id.* at 18 n.4.

98. *Id.* at 18.

99. Ervin, *supra* note 8, at 537; Howard, *supra* note 37, at 577-78.

100. HELLERSTEIN & HELLERSTEIN, *supra* note 22, ¶ 6.11[2].

101. *See id.* The *Geoffrey* court made no attempt to determine if there were differences between an income tax and a sales tax that would dictate different treatment of the two types of taxes. *Id.*

102. *Id.*

103. Ervin, *supra* note 8. New Mexico and New Jersey are among the other states that have followed *Geoffrey*. *Id.*

v. Tolson,[104] the North Carolina Court of Appeals found that the use of a trademark within the State provided "a substantial nexus . . . sufficient to satisfy the Commerce Clause," even though A & F had no physical presence in the State.[105] However, the North Carolina court determined that "there are important distinctions between sales and use taxes and income and franchise taxes 'that makes [sic] the physical presence test . . . inappropriate as a nexus test.'"[106] The court found that "'[t]he use tax collection cases were based on the vendor's activities in the state, whereas, the income and franchise taxes [imposed on intangible holding companies] are based solely on 'the use of [intangible] property in this [S]tate,'" rather than the taxpayer's activity in the State.[107] The court stated that presence in a state was not essential for the state to impose tax on a non-resident that received income from intangible property in the state.[108] The court also noted that unlike an income tax that is "paid only once a year, to one taxing jurisdiction and at one rate," sales and use tax is collected by a vendor acting as an agent of the state and paid over at regular intervals during the year, "to more than one taxing jurisdiction within a state and at varying rates."[109]

In contrast, in *J.C. Penney National Bank v. Johnson*,[110] the Tennessee Court of Appeals implicitly rejected the contention that mere economic presence within the State satisfies the *Complete Auto* substantial nexus requirement.[111] In *J.C. Penney*, Tennessee sought to impose its franchise tax on income generated by J.C. Penney National Bank's (JCPNB) credit card operations in the state.[112] JCPNB, a Delaware corporation, had no employees or offices in Tennessee.[113] The court found that, in light of *Quill*, JCPNB's activities within the State did not satisfy "the substantial nexus requirement of *Complete Auto*."[114] In doing so, the court acknowledged that the Supreme Court has not articulated a physical presence requirement for taxes other than sales/use taxes.[115] However, the court found that the physical presence required under *Quill* governed the imposition of the franchise tax because it could find no basis to conclude that the analysis for franchise taxes should be different than that used for sales/use taxes.[116] While

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104. 605 S.E.2d 187 (N.C. Ct. App. 2004), *cert. denied*, 2005 U.S. LEXIS 6033 (2005).

105. *Id.* at 195.

106. *Id.* at 194 (quoting Jerome R. Hellerstein, Geoffrey *and the Physical Presence Nexus Requirement of* Quill, 8 STATE TAX NOTES 671, 676 (1995)).

107. *Id.* (quoting Hellerstein, *supra* note 106, at 676).

108. *Id.* at 194-95 (citing Int'l Harvester Co. v. Wisc. Dep't of Taxation, 322 U.S. 435, 441-42 (1944)).

109. *Id.* at 195 (quoting Kmart Props., Inc. v. Taxation and Revenue Dep't of N.M., 131 P.3d 27 (N.M. Ct. App. 2001)).

110. J.C. Penney Nat'l Bank v. Comm'r of Revenue, 19 S.W.3d 831 (Tenn. Ct. App. 1999).

111. *Id.* at 839.

112. *Id.* at 832.

113. *Id.* at 839.

114. *Id.*

115. *Id.*

116. *Id.* The court stated that any constitutional differences between the franchise tax imposed

the court felt bound by the ruling in *Quill*, it stopped short of finding that "physical presence" is required for the imposition of all state taxes under the Commerce Clause.[117] Texas and Missouri are among the states that seem to have similarly rejected *Geoffrey's* economic nexus concept.[118]

D. The Unitary Alternative

Rather than venture into the economic nexus/physical presence debate, many states simply require combined reporting. This method of reporting, which is based on the "unitary business principle,"[119] eliminates the effect of income shifting restructuring.[120] The unitary method, which the Supreme Court has found constitutional,[121] is currently required by about a dozen states.[122] Additionally, roughly twenty other separate filing states permit, and may also require, the combined filing to fairly reflect the income derived from within the state.[123] Indiana is among those states with respect to adjusted gross income tax.[124]

The unitary business principle considers commonly controlled entities a single business enterprise without regard to corporate structure, so long as the activities of all of the entities included in the combined reporting contribute to the conduct of the business enterprise as a whole.[125] The relation of the business's out-of-state activities to the in-state activities provides the "'definite link' or 'minimum connection'" necessary to include all of the business

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by Tennessee and the sales/use tax in *Quill* were "not within the purview of this court to discern." *Id.*

117. *Id.* at 842.

118. *See generally* Bauman & Schadewald, *supra* note 90.

119. Cory D. Olson, *Follow the Giraffe's Lead*—Lanco, Inc. v. Director, Division of Taxation *Gets Lost in the Quagmire That Is State Taxation*, 6 MINN. J. L. SCI. & TECH. 789, 802 (2005).

120. *Id.*

121. *See generally* Bauman & Schadewald, *supra* note 90; *see also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 179 (1983); Mobile Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425, 438 (1980); Olson, *supra* note 119, at 802.

122. Olson, *supra* note 119, at 802.

123. *Id.*

124. The Indiana Code states:

> [i]n the case of two (2) or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests, the department shall distribute, apportion, or allocate the income derived from sources within the state of Indiana between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from sources within the state of Indiana by various taxpayers.

IND. CODE § 6-3-2-2(m) (2006).

125. William F. Fox et. al., *How Should a Subnational Corporate Income Tax on Multistate Businesses Be Structured?*, 58 NAT'L TAX J. 139 (Mar. 2005), *available at* 2005 WLNR 5727054, at *9, *17-18.

enterprise's income in the state's apportionable base.[126] A unitary relationship among entities is generally evidenced by 1) common ownership, 2) centralized management, and 3) economic interdependency such as vertical integration, inter-company transactions and/or shared economies of scale.[127]

The combined reporting method is not without its drawbacks. The primary drawback is that corporations generating a loss that form a part of the unitary business are drawn into the state that would otherwise be excluded in a separate reporting scheme.[128] Additionally, some states might have to overhaul their taxing scheme to implement the unitary method.[129] While the unitary method is favored by academics,[130] the high price associated with a restructuring of a state taxing scheme, along with political concerns, may render it impractical for states to implement a unitary taxing structure.[131]

III. RESPONSE OF THE BANKING INDUSTRY TO THE 2002 AMENDMENT

The 2002 amendment limited the Indiana unitary group to members of the unitary business enterprise transacting business in Indiana.[132] With the unitary business concept effectively discarded, banks discovered that their business could be restructured using a variety of pass-thru and special purpose entities that had the potential to avoid taxation under the statute. The use of such entities, if successful, could cost the State millions of dollars at a time when the State is struggling to meet its financial obligations. However, the statute does contain provisions that can potentially be used by the State to bring these entities within the scope of the law. There likely will be vigorous disagreement between the banking industry and the State concerning the use of these provisions.

Even after the 2002 amendment, the statute still embraces the economic nexus concept.[133] The economic nexus concept results in the imposition of tax on business entities that are engaged in activities included in the definition of transacting business in Indiana even though those entities have no physical presence in the State.[134] The statute includes engaging in any of the following activities in its definition of transacting business in Indiana: 1) "regularly soliciting business from customers in Indiana"; 2) "regularly perform[ing]

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126. HELLERSTEIN & HELLERSTEIN, *supra* note 22, ¶ 8.07[1].

127. *Id.* at [3]; Fox et al., *supra* note 125, at *18.

128. Howard, *supra* note 37, at 571.

129. Olson, *supra* note 119, at 802.

130. *Id.*

131. *Id.*

132. IND. CODE § 6-5.5-1-18(a) (2006). As a result, the income of members of the unitary business enterprise that are not transacting business in Indiana will no longer be included in the taxable base subject to apportionment to Indiana. *Id.*

133. The Indiana Code includes in the definition of doing business in Indiana activities that derive income from the Indiana economic market without regard to whether a physical presence is maintained in the State. *Id.* § 6-5.5-3-1.

134. *Id.*

services outside Indiana that are consumed within Indiana"; 3) "regularly selling products or services to Indiana customers"; and 4) "regularly engag[ing] in transactions with customers in Indiana that involve intangible property that results in receipts flowing from within Indiana to the taxpayer."[135] The statute does not include in its definition of transacting business in Indiana, ownership of an interest in a pass-thru entity engaged in the listed activities.[136] This omission, in conjunction with the provision that defines a taxpayer for financial institution tax purposes as a corporation, has prompted banks to restructure business transactions to avoid the tax using REITs, RICs, and partnerships.

A. REITs

A REIT is an investment company that holds real estate investments.[137] A REIT is special purpose pass-thru entity that would otherwise be taxed as a domestic corporation which allows small investors to pool their funds to obtain diversification and skilled portfolio management.[138] REITs are commonly used to hold pools of mortgages that back publicly traded mortgage backed securities. REITs are also used to hold investments in income producing real property such as office complexes. An entity is required to have at least one hundred (100) beneficial owners to qualify as a REIT.[139] In addition, a REIT cannot be closely held as that term is defined under the Internal Revenue Code provisions applicable to personal holding companies.[140]

REITs receive favorable treatment under the Internal Revenue Code. Unlike other types of business entities, REITs are allowed to deduct dividends paid to shareholders in determining their net federal taxable income,[141] which is the starting point for calculating the Indiana financial institutions tax liability.[142] The Internal Revenue Code also provides a one hundred percent (100%) deduction for dividends received from members of a taxpayer's affiliated group.[143] These two Internal Revenue Code provisions taken together afford financial institutions a unique tax planning opportunity.

Financial institutions can form a REIT to hold their investment in mortgage pools secured by real property and rent producing real property. The financial institution must also form a wholly owned subsidiary corporation to hold the interest in the REIT. The interest, rent and other gains earned by the REIT are

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135. *Id.*

136. *Id.*

137. *The States Abusive Tax Shelter Symposium*, FED'N OF TAX ADMIN., Aug. 2004 (on file with author) [hereinafter *Shelter Symposium*].

138. *Id.*

139. I.R.C. § 856(a)(5) (2000).

140. *Id.*

141. *Id.* § 857(b)(2)(B).

142. IND. CODE § 6-5.5-1-2 (2006).

143. I.R.C. § 243 allows for the deduction of dividends received from a member of the taxpayer's affiliated group.

passed to the holding company in the form of a dividend from the REIT, reducing the REIT's income to zero.[144] The holding company then issues the dividend to the parent financial institution. The holding company is not a member of the Indiana unitary group because holding an interest in a REIT is specifically excluded from the definition of transacting business in Indiana.[145] Therefore the holding company escapes the tax on the REIT dividend. The dividend paid by the holding company is included in the parent financial institution's income, however, the parent eliminates the dividend from its net income utilizing the deduction allowed for dividends received from a member of its affiliated group.[146] The result is that the income from financial institution's real property holdings escape taxation entirely, even though the REIT is transacting the business of a financial institution in Indiana and is includible in the Indiana unitary return.[147]

Indiana has not addressed the use of REITs by financial institutions to shelter income thus far. There are several possible responses to this structure. The first is to disallow the deduction of the dividend in computing the REIT's taxable income because it is a transaction without economic substance.[148] The crux of this argument is that the taxpayer has structured a transaction without true economic substance for the sole purpose of obtaining a tax benefit.[149] Transactions that have been undertaken for the sole purpose of tax avoidance have been disallowed under "economic substance doctrine."[150] The State will point out that purpose of the REIT is to allow small investors to diversify; allowing large corporate investors to use a REIT to shelter income defeats the purpose for which these entities were conceived.[151] Financial institutions will have to offer a valid business purpose for the creation of the REIT to avoid disallowance of the dividend deduction.

If a financial institution can provide a valid business purpose for the REIT structure, the State will be forced to resort to the use of the "fairly represents"

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144. I.R.C. § 857(b)(2)(B) (2000).

145. IND. CODE § 6-5.5-3-8(5)(A) (2006).

146. I.R.C. § 243 (2000).

147. Indiana Code section 6-5.5-3-1(6) includes holding mortgages secured by real property in Indiana in the definition of transacting business in Indiana. IND. CODE § 6-5.5-3-1(6) (2006). Indiana Code section 6-5.5-1-18(a) defines the unitary group as all members of the unitary business transacting business in Indiana without regard to the classification of the entity as a corporation or a pass-thru entity. *Id.* § 6-5.5-1-18(a). Indiana Code section 6-5.5-5-1 requires all members of the Indiana unitary group to file one combine return. *Id.* § 6-5.5-5-1.

148. *Shelter Symposium, supra* note 137.

149. *Id.*

150. Peter J. Connors et al., *Recent Cases Involving the Economic Sham Transaction Doctrine-Or Whatever They Are Calling It Now*, 683 TAX & LAW PRAC. 1261, 1269-70 (PLI Tax L. & Est. Plan. Course, Handbook Series 2004). Connors's survey of cases finds that "if there is no primary business purpose for a transaction, the courts have been reluctant to respect the transaction for tax purposes." *Id.*

151. *Shelter Symposium, supra* note 137.

language included in the statute to recapture the income. The statute includes a catch all provision that allows reallocation of tax items between members of the unitary group if the use of the provisions provided under the statute do not fairly represent the income derived from Indiana sources.[152] The State will need to successfully argue that the holding company's dividend must be reallocated to the financial institution parent to fairly represent income from Indiana sources. Financial institutions will contend that the holding company's income was explicitly excluded from taxation under the statute and that requiring its inclusion is contrary to the intent of the legislature. If a court is not willing to disallow the REIT structure for lack of economic substance, it is unlikely it will allow effectively the same outcome using the "fairly represents" approach, particularly when the holding company is not includible as a member of the Indiana unitary group.

B. RIC

A RIC is an investment company that invests or trades in securities.[153] A RIC is special purpose pass-thru entity that allows for small investors to pool their funds to obtain diversification and skilled portfolio management.[154] An entity is required to have at least one hundred (100) shareholders and an intent to make a public offering to qualify as a RIC.[155] In addition, a RIC must be listed with the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940.[156] In its most common form, a RIC is used to facilitate mutual funds.[157] Like a REIT, the dividends paid to shareholders by a RIC are deductible in determining the RIC's taxable income.[158]

Financial institutions can form a RIC held by a subsidiary holding corporation to hold their investment portfolios. The interest, dividends and other gains earned by the RIC are passed to the holding company as a dividend, which is deducted from the net income of the RIC, reducing the RIC's net income to zero.[159] The holding company receiving the RIC dividend is not subject to the financial institutions tax because it is not conducting the business of a financial institution in Indiana.[160] The holding company remits the dividend to the parent financial corporation. The holding company dividend is included in the parent financial institution's income, however, the parent eliminates the dividend from

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152. Indiana Code section 6-5.5-5-1(b) allows the Department of Revenue to reallocate tax items between a taxpayer and a member of the unitary group if the result of applying the statute does not fairly represent the taxpayer's income within Indiana. IND. CODE § 6-5.5-1(b) (2006).

153. *Shelter Symposium*, *supra* note 137.

154. *Id.*

155. Investment Company Act of 1940, 15 U.S.C. § 80 (2000).

156. *Id.* §§ 80a-1-80b-2; I.R.C. § 851(a)(1) (2004).

157. *Shelter Symposium, supra* note 137.

158. I.R.C. § 852(b)(2)(D) (2000).

159. *Id.* § 851(a)(1).

160. IND. CODE § 6-5.5-3-1 (2006).

its net income utilizing the deduction allowed for dividends received from a member of the affiliated group.[161] As a result the portfolio income previously included in the taxable base escapes taxation entirely.

While a RIC is largely unnecessary to avoid the Indiana financial institution tax, it is likely that large non-resident financial institutions that file returns in Indiana will use the RIC structure to avoid tax in other states. Unlike the activities of a REIT, the management of the financial institution's own portfolio is not included in the definition of transacting business for financial institutions tax purposes.[162] Therefore, the financial institution can merely form a wholly owned subsidiary corporation to hold the investment portfolio to achieve the same result. The activities of the subsidiary investment company would only be subject to the tax if the investment company maintains an office or employees in the State.[163] A financial institution headquartered outside Indiana would have little incentive to locate its investment company's office or employees inside the State.

A RIC is most useful for resident financial institutions to shelter portfolio income from taxation by states other than Indiana. For financial institutions that have all of their property and payroll located in Indiana, the formation of a subsidiary incorporated in a tax friendly[164] state is an attractive option to attempt to insulate investment portfolio income from the tax. The drawback of this planning strategy is that generally, in an effort to maintain control of the investments, the officers of the financial institution in Indiana will also be the officers of the subsidiary. Likewise, the financial institution's employees will direct the investments and perform management and accounting functions for the subsidiary. The subsidiary will report no payroll in Indiana because both the officers and employees are paid by the parent; however, these financial institutions may find it difficult to contend that the investment company does not maintain an office or representatives in Indiana due to the activities of these officers and employees, regardless of the subsidiary's state of incorporation.[165]

As with REITs, Indiana has not addressed the use of RICs by financial institutions to shelter income. The range of possible State responses is somewhat similar to those available with REITs. However, because the activities of the RIC are not independently subject to the tax,[166] Indiana will have a greater incentive to disallow the deduction of the dividend from the parent financial institution's federal taxable income rather than disallowing the dividend

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161. I.R.C. § 243.

162. IND. CODE § 6-5.5-3-1.

163. *Id.*

164. A state that either does not tax such income or taxes it at a lower rate.

165. Typically, the officers or employees of the financial institution are also the officers of the investment company even if the company has a registered agent outside the state in which the financial institution is headquartered. Likewise, the investment company's managerial, accounting, and administrative functions are generally performed by the financial institution's employees.

166. IND. CODE § 6-5.5-3-1.

deduction from the RIC.[167]

Similar to a REIT, RICs are vulnerable to attack as lacking economic substance. Financial institutions will have to offer a valid business purpose for the creation of the RIC structure. However, the State will be forced to resort to the use of the "fairly represents" language included in the statute to reallocate the dividend received by the holding company to the financial institution parent if a valid business purpose is shown for the RIC.[168] This seems even less likely to be blessed by a court in the case of a RIC, as opposed to a REIT, because the RIC's income would not be subject to the tax if the portfolio was held by a regular corporation.[169]

The income from other banking services such as credit card operations, secured and unsecured consumer loans and the extension of commercial credit has the potential to be sheltered in whole or in part from the tax through the use of more traditional pass-thru entities such as partnerships and limited liability companies. The use of these pass-thru entities is most effective when at least one tier of holding companies is used to hold the interest in the pass-thru thereby insulating the receipts from the tax.

C. Partnerships

Financial institutions can form a variety of structures involving traditional pass-thru entities in attempting to minimize or avoid the tax. The simplest of these structures is accomplished by forming two holding corporations that will each hold an interest in a partnership. The operation the financial institution seeks to protect is transferred to, then operated by, the partnership. This structure attempts to allow the financial institution to minimize tax by controlling the manner in which income from the operation is reported and the effect of the operation's receipts on the Indiana unitary group's apportionment percentage.

The statute contains two seemingly conflicting provisions concerning the treatment of the income of a partnership that is held by a corporate partner, which is in turn owned by a financial institution. Indiana Code section 6-5.5-1-18 includes a pass-thru entity that is conducting the business of a financial institution in Indiana as a member of the Indiana unitary group. The apportioned income of the Indiana unitary group is the aggregate adjusted gross income for all members of the unitary group multiplied by a ratio determined by dividing the Indiana receipts of the group by the receipts of the group everywhere.[170] All members of the Indiana unitary group must be included in the combined unitary return.[171] In contrast, Indiana Code section 6-5.5-2-8 defines the corporate partner as a taxpayer under the statute, and requires the corporate partner to

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167. *Id.* § 6-5.5-3-8(5)(A).

168. *Id.* § 6-5.5-5-1.

169. *Id.* § 6-5.5-3-1.

170. *Id.* § 6-5.5-2-4; see *infra* Part III.D for more in depth discussion of apportionment numerator and denominator.

171. IND. CODE § 6-5.5-5-2 (2006).

include the partnership income in the corporate partner's income. However, the corporate partner cannot be included in the unitary return because, while it is a taxpayer, it does not transact business in Indiana under the statute's definition of that term.[172]

Financial institutions can interpret these two provisions in the statute as allowing them a choice in how to report the income from a partnership using this type of structure. The financial institution will contend that it may choose to include the operating results of the partnership in the unitary return and the receipts of the partnership in the apportionment calculation or the corporate partner may separately report the partnership's income outside the unitary return. This allows the financial institution to control the partnership's effect on the unitary group's apportionment percentage, which is a single factor percentage based solely on receipts.[173] This structure is most useful to shield the unitary apportionment percentage from the impact of the receipts of credit card operations. The receipts from credit card operations generally increase the Indiana apportionment percentage when Indiana credit card receipts are included in the numerator,[174] particularly for large multi-state financial institutions.

The State likely will view the partnership's operating results and receipts for apportionment as includible in the unitary return. This is consistent with the unitary principle[175] on which the financial institutions tax was based and is supported by the statutory definition of a unitary group in the article.[176] Allowing the corporate partner to separately report the partnership results affords non-unitary treatment for a segment of the unitary business. The State can offer that this mode of reporting runs contrary to legislative intent, and also point out that while most taxing jurisdictions, including the IRS,[177] allow a business to choose any type of structure it sees fit, taxing jurisdictions do not allow a taxpayer a choice concerning the manner of taxation after a particular entity type has been selected. Finally, using established pass-thru and unitary principles, the State may successfully attempt to directly attribute the partnership receipts to the corporate partner. Such attribution brings the partner within the definition of transacting business in the State, thereby requiring the inclusion of the corporate partner in the Indiana unitary group.[178]

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172. *Id.* §§ 6-5.5-1-18, -3-1.

173. *Id.* § 6-5.5-2-4.

174. *See infra* Part III.D. There is some doubt that the receipts of a pass-thru entity must be included in the numerator for apportionment.

175. Hunt Corp. v. Ind. Dep't of Revenue, 709 N.E.2d 766, 777 (Ind. Tax Ct. 1999).

176. IND. CODE § 6-5.5-1-18 (2006); see *supra* text accompanying notes 80-90 for discussion of unitary business principle as a basis for financial institutions tax.

177. *See generally* 26 U.S.C. §§ 1-9833 (2000) (providing separate taxing schemes based on an entity's classification under I.R.C. § 7701). For instance, C corporations, Subchapter S corporations, partnerships, REITs and RICs are taxed in accordance with their business classification.

178. *See infra* Part III.D. Including the corporate partner is important for the apportionment calculation because the corporation is defined as a taxpayer, but the partnership is not. The

Attempting to shelter all of the partnership's income from the tax requires a structure that adds an additional layer of holding partnerships between the holding company corporations and the operating partnership. The corporate partner in this structure is not subject to the provisions of Indiana Code section 6-5.5-2-8 which requires the partner to file a return to report the partnership income because the corporate partner is not holding an interest in a partnership that is transacting the business of a financial institution.[179] The holding partnership is not a taxpayer because it is not a corporation.[180] Neither the holding company corporate partner nor the holding partnership is transacting business in the state.[181] Therefore, neither the corporate partner nor the holding partnership can be included in the unitary group.[182] Financial institutions contend that the operating partnership's income is attributable to the holding partnership and the holding partnership's income is attributable to the holding company, neither of which is either required to file a return or includible in the unitary group; therefore, the operating partnership is not subject to the tax. This contention has at least one potentially fatal flaw. The operating partnership is includible in the unitary return under the statute.[183] As with the single pass-thru structure, the State can attempt to attribute the receipts from transacting business in Indiana to the holding partnership and then to the corporate partner, bringing both within scope of the Indiana unitary group.

Financial institutions that directly hold pass-thru entities that transact the business of a financial institution may also attempt to derive benefit from the ambiguity contained in the statute with respect to Indiana Code section 6-5.5-2-8. This section of the statute requires that the corporate partner "include in the corporation's adjusted or apportioned income the corporation's percentage of the partnership . . . adjusted gross income or apportioned income."[184] Financial

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numerator of the sales factor includes the receipts of taxpayer members of the unitary group, while the denominator includes the receipts of all members of the unitary group. IND. CODE § 6-5.5-2-4(2)(A), (B) (2006).

179. Indiana Code section 6-5.5-3-1 does not include owning an interest in a pass-thru that is conducting the business of a financial institution in the definition of transacting business in Indiana. IND. CODE § 6-5.5-3-1 (2006). Indiana Code section 6-5.5-2-8(a) requires a corporation that holds an interest in a partnership that is transacting the business of a financial institution to file a return reporting the partnership income. *Id.* § 6-5.5-2-8(a). The corporate holding company is engaged in the business of holding an interest in a holding partnership. The holding partnership, by merely holding an interest in the operating partnership, is not transacting the business of financial institution. *Id.* § 6-5.5-3-1.

180. Under Indiana Code section 6-5.5-2-8(a), an entity that holds an interest in a pass-thru must be a corporation to be a taxpayer. *Id.* § 6-5.5-2-8(a).

181. *Id.* §§ 6-5.5-2-8(a), -3-1.

182. Under Indiana Code section 6-5.5-1-18(a) only members of the unitary group that transact business in Indiana can be included in the unitary filing. *Id.* § 6-5.5-1-18(a).

183. All entities that transact business in Indiana are in the Indiana unitary group, regardless of entity classification. *Id.*

184. *Id.* § 6-5.5-2-8.

institutions can contend that this section allows them to choose to include either the entire adjusted gross income of the partnership in the unitary group's adjusted gross income subject to apportionment or only the Indiana portion of the partnership's income. The Indiana portion of the partnership's income is determined by apportioning the partnership's income prior to inclusion in the combined return. This allows the financial institution to control the effect of the partnership on both the base income of the unitary group subject to apportionment and the Indiana receipts included in determining the Indiana apportionment percentage.

The State can assert that the interpretation of this section of the statute as offering a choice of reporting methods is in error because it can only be reached by reading this code section in isolation from all other sections of the statute. The State can argue that choice of the drafters of the statute to address certain reporting requirements in a single section for both corporate partners that must include adjusted gross income, and those that must report apportioned income cannot be interpreted to nullify the sections of the statute explicitly requiring the inclusion of the adjusted gross income rather than the apportioned income of a partnership in the combined return.[185] The State may insist that the cannons of statutory construction require Indiana Code section 6-5.5-2-8 be interpreted in a manner that gives effect to all other sections of the statute.

D. Dilution of Indiana Apportionment Percentage

In addition to sheltering income from taxation, the pass-thru entities can be used to dilute the Indiana apportionment percentage. The financial institutions tax defines a taxpayer as a corporation.[186] The law relies on I.R.C. § 7701(a)(3) to define a corporation.[187] Under § 7701(a)(3), a pass-thru entity is not a taxpayer for financial institutions tax purposes.[188] However, pass-thru entities

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185. Indiana Code section § 6-5.5-5-2 provides that a combine return must include the adjusted gross income of all members of the unitary group, even if some of the members would not otherwise be subject to taxation under the statute. No provision is made for the inclusion of apportioned income. *Id.* § 6-5.5-5-2 (2006). Indiana Code 6-5.5-2-4 defines the apportioned income for a unitary group as the aggregate adjusted gross income, from whatever source derived, of the members of the unitary group multiplied by the Indiana apportionment percentage. Again, no provision is made for apportioned income. *Id.* § 6-5.5-2-4. Indiana Code section 6-5.5-1-18 defines the members of the unitary group to include any entity, regardless of form, engaged in a unitary business transacted in Indiana. *Id.* § 6-5.5-1-18.

186. *Id.* § 6-5.5-1-17(a).

187. *Id.* § 6-5.5-1-6.

188. REITs and RICs are most likely not corporations under I.R.C. § 7701(a)(3) (2000). Treasury Regulation section 301.7701-2(a) (as amended in 2006) states that a business entity for purposes of I.R.C. § 7701 is any entity recognized for federal tax purposes that is not "otherwise subject to special treatment under the Internal Revenue Code." Treas. Reg. § 301.7701-2(a) (as amended in 2006). Both REITs and RICs are subject to special treatment under the Internal Revenue Code. Therefore, a REIT or RIC is not a business entity within the meaning of § 7701 and

that: 1) hold mortgages on real property located in Indiana, 2) engage in credit card transactions with customers in the State, or 3) extend credit in the form of secured and unsecured loans to borrowers in the State, are transacting business in Indiana. Therefore, these pass-thru entities are included in the Indiana unitary group regardless of their lack of status of as a taxpayer.[189] Curiously, the Indiana apportionment percentage is defined as a ratio, the numerator of which is all receipts attributable to Indiana for taxpayer members of the unitary group, while the denominator is composed of the receipts for all members of the unitary group in all taxing jurisdictions.[190] As a result, the pass-thru entity's Indiana source receipts do not appear to be included in the numerator and the pass-thru entity's receipts from all taxing jurisdictions appear to be included in the denominator.

The State can counter the inclusion of the receipts of pass-thru entities in the denominator and not the numerator using either the basic unitary principles presumed by the law or the "fairly represent" provisions of the statute. The corporate owners of the pass-thru entities are presumed to have a unitary relationship with the pass-thru entities under the FIT law.[191] Where a unitary relationship exists, the partnership receipts flow-thru to the corporate partners in proportion to their ownership percentage.[192] Receipts that flow from a partnership to a corporate partner retain their character.[193] For example, a capital gain at the partnership level flows-thru to the corporate partner as a capital gain. The State can contend that the receipts from transacting the business of a financial institution flow to the corporate partner with that same character, resulting in the corporate partner's receipts being characterized as receipts from transacting business in Indiana, rather than merely receipts from holding a partnership interest. If the Indiana receipts that flow from the pass-thru entity to the corporate partner can be characterized as the Indiana receipts of the corporate partner, the receipts can be included in the numerator of the apportionment factor[194] because the corporate partner will be a taxpayer member of the unitary group.[195]

Financial institutions may respond that these general principles have been accepted for apportionment only for net income taxes, and the financial

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probably falls outside the definition of a corporation for financial institution tax purposes.

189. IND. CODE § 6-5.5-1-18(a) (2006).

190. The numerator of the sales factor includes the receipts of taxpayer members of the unitary group; the denominator includes the receipts of all members of the unitary group. *Id.* § 6-5.5-2-4(2).

191. *Id.* § 6-5.5-1-18(b). Unity is presumed under the law for all entities directly or indirectly owned by the financial institution based on the controlled interaction among entities that are members of the unitary group.

192. Hunt Corp. v. Ind. Dep't of Revenue, 709 N.E.2d 766, 777 (Ind. Tax Ct. 1999).

193. I.R.C. § 702(b) (2000) states that "[t]he character of any item of income, gain, loss, deduction, or credit" attributable to the partner shall be treated "as if such item were realized directly from the source from which realized by the partnership."

194. IND. CODE § 6-5.5-2-4(2)(A) (2006).

195. I.R.C. § 702(b); *Hunt Corp.*, 709 N.E.2d at 777.

institutions tax implicitly rejects these general principles by its structure and plain language. However, the financial institutions tax is built on the unitary principles enunciated by the Supreme Court in the net income tax arena.[196]

If the State is unable to attribute the partnership's business receipts directly to the corporate partner, the State will probably have to show that the exclusion of the pass-thru's Indiana receipts from the numerator does not "fairly represent" income from within Indiana.[197] Financial institutions will again argue that inclusion of the pass-thru entities is contrary to the plain meaning of the statute and that it is contrary to legislative intent.

CONCLUSION

While the economic nexus concept may appear to be a lifeline to states drowning in a sea of red ink, it is an unnecessary expansion of the states' ability in tax interstate commerce. The unitary business principle and state "fairly represent" statutes provide the states with adequate means to ensure their ability to tax their fair share of multi-state business operations. Conversely, the economic nexus concept will almost surely lead to overreaching by the states. If history is indeed a teacher, the temptation for state legislatures to balance budgets on the backs of those unable to vote in the state will ultimately prove irresistible.

The economic nexus approach has the potential to allow states to impose a tax on a single company with minimal contacts to the taxing state. With the emergence of the Internet, smaller businesses that have never had the resources to compete in the national marketplace now have that opportunity. Under an economic nexus standard, revenue hungry states would be free to impose tax on businesses that do not have the resources or sophistication to comply with the taxing schemes of fifty states or mount a defense against overly aggressive state taxes. A small business may very well decide to forgo providing products or services to residents of a given states or states when faced with the additional compliance burden. The states' interest in taxing their fair share of multi-state business operations and/or combating income shifting does not justify such a burden on interstate commerce.

The economic nexus concept will also lead to inefficiency and an increase in double taxation of income. Unlike a bright line physical presence test that

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196. Allied-Signal, Inc. v. Dir. Div. of Taxation, 504 U.S. 768, 783 (1992); *see also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 179 (1983); Mobile Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425, 438 (1980). Indiana Code section 6-5.5-1-18(a) defines "unitary business" as business operations "that are of mutual benefit, dependent on, or contributory to" the group's "transacting the business of a financial institution." IND. CODE § 6-5.5-1-18(a) (2006). Unity is presumed where there is unity of ownership, centralized management and controlled interaction among entities. *Id.* § 6-5.5-1-18(b).

197. Indiana Code section 6-5.5-5-1(b) allows the Department of Revenue to reallocate tax items between a taxpayer and a member of the unitary group if the result of applying the statute does not fairly represent the taxpayer's income within Indiana. IND. CODE § 6-5.5-5-1(b).

settles the expectations of states and businesses alike, economic nexus will have to be determined on a case by case basis to determine whether a given economic activity satisfies the substantial nexus requirement. This will not only consume considerable judicial resources, it may retard investment in interstate commerce as businesses become more cautious in an atmosphere where state laws are unsettled, lack uniformity and present a greatly increased potential for double taxation.

Left to their own devises, it is unlikely that states will reach the same conclusions as to what, or how much, economic activity constitutes substantial nexus. It is even more unlikely that the states will agree to the manner in which receipts are to be sourced for apportionment purposes. As a result, the potential for the income from any given transaction to be sourced to two, three or more states is increased dramatically. The burden on interstate commerce that double taxation represents and the inefficiencies associated with implementing the economic nexus standard make clear that it should not be utilized until commerce has evolved in a manner that absolutely necessitates it. While there is no doubt that the time will come when such a necessity exists, now is not that time.

The fate of the financial institutions tax as amendment in 2002 is inextricably tied to the constitutionality of the economic nexus concept. This can be cured by returning to the unitary taxing scheme envisioned in the law as originally enacted. In addition, a return to the unitary business principle would eliminate the temptation for financial institutions to restructure their operations to avoid the tax. However, even if the law is not restored to include all members of the unitary group, the law can still be amended to eliminate the ability of financial institutions to shift income away from the state. By altering either: 1) the definition of transacting business in Indiana to include direct and indirect ownership of a pass-thru conducting the business of a financial institution in the State, or 2) the definition of a taxpayer to include pass-thru entities, the majority of the income shifting strategies would be eliminated while restricting the imposition of the tax to only members of the unitary group transacting business in Indiana. These remedial measures would result in the fair apportionment of income to the State while still addressing the concerns of regional banks that a level playing field be preserved.

RESOLVING THE CATCH 22: FRANCHISOR VICARIOUS LIABILITY FOR EMPLOYEE SEXUAL HARASSMENT CLAIMS AGAINST FRANCHISEES

SEAN OBERMEYER*

INTRODUCTION

During the last fifty years, modern business format franchising has emerged as one of the most popular and lucrative forms of doing business. Throughout the country, franchised businesses now employ significant numbers of workers and bring in billions of dollars in income annually.[1] The success of the franchising model is attributable to several factors, most notably its focus on creating a uniform public image and requiring consistency of operations at each location.[2]

What makes franchising unique is that it has successfully blended two opposing concepts of control. On one hand, a franchisor creates a comprehensive operating system and must exercise control over its franchisees to enforce that system.[3] A central premise of franchising is that each location is uniform in appearance, practices, and services provided.[4] Franchisors routinely perform inspections at each location to ensure compliance.[5] Additionally, franchisors frequently promulgate training regimes and marketing plans that are used system-wide to enhance uniformity of results.[6] Without such control, a franchisor arguably could not maintain its uniform brand image or the consistency of operations across its locations.

On the other hand, a franchisor heavily relies on the monetary investments as well as the motivation, skill, and local knowledge of its franchisees to implement the comprehensive operating system on a daily basis.[7] In other words, franchisees function simultaneously as quasi-independent owners and as quasi-dependent managers.[8] This duality has allowed franchisors to cash in on the

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1. NATIONAL ECONOMIC CONSULTING PRACTICE OF PRICEWATERHOUSECOOPERS, ECONOMIC IMPACT OF FRANCHISED BUSINESSES 10 (2004), *available at* http://www.franchise.org/files/EIS6_2.pdf [hereinafter ECONOMIC IMPACT].

2. THOMAS S. DICKE, FRANCHISING IN AMERICA 155 (1992).

3. *See* ROGER G. BLAIR & FRANCIS LAFONTAINE, THE ECONOMICS OF FRANCHISING 118-121 (2005).

4. *See* DICKE, *supra* note 2, at 155.

5. *See, e.g.*, Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792, 807 (D. Or. 1998); Miller v. McDonald's Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997).

6. BLAIR & LAFONTAINE, *supra* note 3, at 119-120.

7. DONALD D. BOROIAN & PATRICK J. BOROIAN, THE FRANCHISE ADVANTAGE 50-52 (1987).

8. *See generally* John Stanworth, *The Franchise Relationship: Entrepreneurship or Dependence?*, *in* FRANCHISING: CONTEMPORARY ISSUES AND RESEARCH 161 (Patrick J. Kaufmann & Rajiv P. Dant eds., 1995).

benefits of operating large national chains without having the burden of overseeing every detail of daily operations. It has also allowed thousands of individual franchisees to become small business owners without taking on the full risks of starting a business.

Although this novel form of control is at the heart of the franchising model's success, it also has given rise to an important and controversial question, namely, to what extent should a franchisor be held vicariously liable for the wrongful acts of its franchisees? Traditionally, courts have turned to the Restatement (Second) of Agency to answer this question.[9] In making determinations of vicarious liability, the Restatement analysis, as it has been formulated by the courts, focuses on the degree of control a franchisor exercises over the daily operations of a franchisee.[10] The more control the franchisor exercises, the more likely a franchisor is to be found vicariously liable.

At first glance, the test appears straightforward. However, in application, different jurisdictions have reached widely divergent results on very similar fact patterns.[11] This judicial split is particularly concerning since most franchises are national or at least regional operations and, therefore, frequently have locations in a number of different jurisdictions. As a result, a particular franchisor's exercise of control over its franchisees might be held insufficient in one jurisdiction to give rise to vicarious liability, while another jurisdiction might reach the opposite conclusion when reviewing the same exercise of control.[12]

Although the broader question of franchisor vicarious liability is beyond the scope of this Note, the ultimate goal here will be more narrow and will focus on the formulation of a more consistent approach towards resolving questions of franchisor vicarious liability for sexual harassment and discrimination claims which are made against franchisees.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits, inter alia, employers from discriminating against employees on the basis of sex.[13] Following the lead of the Equal Employment Opportunity Commission, the Supreme Court held, in the landmark case of *Meritor Savings Bank v. Vinson*,[14] that discrimination on the basis of sex includes sexual harassment.[15] This Note posits that a franchisor should be held vicariously liable as an employer under Title VII for sexual harassment and discrimination claims against its franchisees.

The central premise of this Note is that public policy, as evidenced by Title

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9. These cases are discussed *infra* Part II.B.

10. *Miller*, 945 P.2d at 1110.

11. These cases are discussed *infra* Part II.B.

12. Quite a few commentators have questioned the fairness of this result. *See, e.g.*, William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 FRANCHISE L.J. 162 (2005); Kevin M. Shelley & Susan H. Morton, *"Control" in Franchising and the Common Law*, 19 FRANCHISE L.J. 119 (2000). Both articles are discussed *infra* Part III.

13. 42 U.S.C. §§ 2000e to -17 (2000).

14. 477 U.S. 57 (1986).

15. *Id.* at 66-67.

VII, favors equal opportunity in employment practices[16] and that franchisors are in a unique position to implement and enforce the mandates of Title VII. Imposing franchisor vicarious liability would serve as a strong incentive for franchisors to stop relying on the divergent practices of their franchisees and, instead, to implement uniform, system-wide practices and procedures, which would lead to more effective efforts to prevent and investigate incidents of sexual harassment.

At the same time, this Note also argues for the creation of a franchisor affirmative defense, which would shield franchisors from vicarious liability in sexual harassment and discrimination cases if the franchisor meets a series of requirements.[17] This defense would vitiate the effect of the current Restatement test, which provides a strong disincentive for franchisors to get too involved in daily operations of franchisees. More specifically, this proposal retains remnants of agency theory by holding the franchisor vicariously liable. However, it provides an incentive (i.e., the avoidance of vicarious liability) to franchisors that take an active part in solving the problem.

Part I of this Note briefly explores the history of modern franchising, from its rise in the first half of the twentieth century to the present. This section also provides statistical data on the impact franchised businesses have on the economy and the workforce. Part II discusses the development of theories of franchisor vicarious liability. It focuses primarily on agency theory, but also briefly discusses the employer-independent contractor and single employer models as well. Part III critiques the prevailing view amongst commentators who have strongly advocated against imposing any form of franchisor vicarious liability. Finally, in Part IV, this Note offers a plan for retaining franchisor vicarious liability for sexual harassment and discrimination claims and the creation of an affirmative defense.

I. A BRIEF INTRODUCTION TO FRANCHISING

A. Economic Significance

Franchising has a strong impact on our national economy. In fact, franchised businesses today provide almost ten million jobs in the United States with a combined payroll of more than $229 billion dollars.[18] In addition, franchises account for 3.2% of all business establishments and 7.4% of all private-sector

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16. *See, e.g.*, H.R. REP. NO. 92-238 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 2137.

17. This affirmative defense is somewhat similar to the Ellerth/Faragher defense (discussed in more detail *infra* Part IV), which was created by the Supreme Court in the companion cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

18. ECONOMIC IMPACT, *supra* note 1, at 10. In fact, "[p]ayrolls distributed because of franchised businesses were at least 10 percent of the private-sector payroll in all but 10 states and the District of Columbia." *Id.* at 14.

jobs in the United States.[19] Moreover, "franchised business provided more jobs in 2001 than the financial activities industry (including banks, insurance carriers, and real estate), construction industry, or information industry (including software and print publishing, motion pictures and videos, radio and television broadcasting, and telecommunications carriers and resellers)."[20] In examining the indirect or "ripple effect" of franchising activities, one study found that franchising actually creates over eighteen million jobs and more than $1.5 trillion in economic output.[21]

B. Historical Background

1. Product Distribution Franchising.—Beginning in the mid-nineteenth century, an early form of franchising emerged when the Singer Sewing Machine Company sold individual salesmen the right to distribute its sewing machines in particular geographic regions.[22] Another early product distribution franchisor was the McCormick Harvesting Machine Company, which manufactured its much famed reaper beginning in the 1840s.[23] Other industries soon embraced the product distribution model as car dealerships, gas stations, and soft drink bottling companies followed the trend in the late 1800s and early 1900s.[24]

Under this form of franchising, the product manufacturer was primarily focused on developing a large distribution network for its products without having to invest large sums of economic and human capital in the process.[25] That is, the manufacturer hoped to gain a large retail market for its products without having to incur the costs and management responsibilities of establishing and maintaining local retail distribution chains.

A major impetus for the franchising model was the ever-expanding nineteenth century national economy, driven by the needs of a growing and evermore urbanized population.[26] Vast improvements in transportation, communications, and manufacturing characterized the new economy.[27] These factors combined to provide manufacturers with "dense and easily accessible

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19. *Id.* at 10.

20. *Id.*

21. *Id.* at 11. The term "ripple effect" takes into account the indirect economic impact franchised businesses have on other industries by stimulating those outside industries to produce more products and, consequently, hire more employees.

22. BOROIAN & BOROIAN, *supra* note 7, at 28. During this time period, the relationship between many product manufacturers and the retailers of their products was gradually shifting from that of a principal and an independent agent to more "symbiotic relationships of franchisor and franchisee." DICKE, *supra* note 2, at 152.

23. For a more detailed account of the development of these two companies, see DICKE, *supra* note 2, at 12-47.

24. BOROIAN & BOROIAN, *supra* note 7, at 28.

25. *Id.*

26. DICKE, *supra* note 2, at 13-14.

27. *Id.*

markets for their wares."[28]

Many companies, such as Singer and McCormick, which were newer and had fewer economic resources, quickly learned that it was not possible to function effectively both as a manufacturer and a national marketer of their products.[29] The financial and administrative expense of setting up company shops was simply cost-prohibitive.[30] Instead, these companies developed networks of authorized agents, on whom the companies relied to bring their products to the nation's consumers.[31] Initially, such companies exercised minimal control over their agents, but, as companies became more experienced with this new business model, they found this was not the best approach.[32]

Companies soon realized that their brand image was closely tied to the business activities of their agents.[33] A manufacturer's agent represented the face of the company to consumers, which was particularly true when the agent owned the exclusive right to market the company's products in a certain geographic region.[34] As a result, a single wayward agent's poor business practices might tarnish the company's reputation for a whole geographic segment of the population. In response, franchisors gradually increased the amount of control they held over their agents by imposing more restrictions, being more selective in choosing agents, and establishing regional offices to oversee the activities of agents.[35]

2. Business Format Franchising.—Following World War II, franchising underwent a gradual transition from product distribution franchising to a more complex and comprehensive mode of doing business, often described as business format franchising.[36] The advent of quick-service restaurants such as A & W, McDonald's, Burger King, and Dunkin' Donuts is the most visible marker of this transition.[37] Business format franchises now employ four times as many workers, generate 2.5 times the payroll, and produce three times the output of product distribution franchises.[38]

Under the business format model, a franchisor allows another party (i.e., the franchisee) to market its products and/or services under the franchisor's name

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28. *Id.* at 15.

29. *Id.* at 16.

30. *Id.*

31. Initially, many selling agents had agreements with more than one manufacturer and sold multiple products. *Id.* The result of this arrangement was that a particular agent, more often than not, had no incentive to sell one product over another. *Id.*

32. BLAIR & LAFONTAINE, *supra* note 3, at 5.

33. *Id.*

34. *Id.*

35. *Id.*

36. BOROIAN & BOROIAN, *supra* note 7, at 29. Use of the term "franchising" in this Note refers to business format franchising, as it has become the dominant form of franchising in the modern era.

37. *Id.* Business format franchising is described in more detail in *infra* Part I.C.

38. ECONOMIC IMPACT, *supra* note 1, at 11.

and trademark using a pre-developed "system" or method of doing business, which the franchisor has created.[39] It is the marketing of the franchisor's system which separates business format franchising from its product distribution predecessor. The franchisor sells not only the right to market its products and use its trademark in a particular geographic region, but also the right to use its "proven business system."[40] In addition to comprehensive operational manuals, a franchisor's system also includes the use of "an established name, training, and a host of professional services such as site selection, managerial assistance, and national advertising, all of which lay beyond the reach of the typical small business person."[41]

Strict adherence by the franchisee to the franchisor's system is a hallmark of the business format model.[42] The rapid growth of franchising has been due in large part to the public's increasing preference for proven quality and uniformity in goods and services.[43] By creating, marketing, and ultimately enforcing its system, a franchisor ensures that its core product or service is presented to the consuming public in a consistent and uniform manner. "[I]t is the consistency of [a] system's operations, service, and product quality that attracts customers and induces loyalty; customers become loyal if the experiences they enjoy at diverse units of these chains routinely meet their expectations."[44]

C. The (In)dependent Franchisee

Like its product distribution predecessor, business format franchising allows the franchisor to rapidly expand into regional, national, and even international markets by tapping into the capital, time, and energy of highly motivated local agents known as franchisees.[45] The franchisee's role is best described by

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39. BOROIAN & BOROIAN, *supra* note 7, at 16; RIEVA LESONSKY & MARIA ANTON-CONLEY, ENTREPRENEUR MAGAZINE'S ULTIMATE BOOK OF FRANCHISES 11 (2005) [hereinafter ULTIMATE BOOK].

40. BOROIAN & BOROIAN, *supra* note 7, at 29. Ray Kroc, who developed the highly successful McDonald's franchising system beginning in the 1950s, is often described as a revolutionary in the field of franchising. *Id.* at 28. Kroc realized early on that the "hands-off" approach used by the McDonald's brothers would prove fatal with time. *Id.* at 31. Instead, he believed that the franchisor should play an active role in the training and ongoing support to its franchisees. *Id.* at 32. Today, McDonald's has more than 30,000 locations worldwide, of which almost 22,000 are owned by franchisees. ULTIMATE BOOK, *supra* note 39, at 274.

41. DICKE, *supra* note 2, at 154.

42. BOROIAN & BOROIAN, *supra* note 7, at 16.

43. DICKE, *supra* note 2, at 155.

44. BLAIR & LAFONTAINE, *supra* note 3, at 117.

45. BOROIAN & BOROIAN, *supra* note 7, at 51. Describing franchisees as highly motivated "managers" rings especially true for franchisors such as Domino's, who specifically target successful store managers at company owned locations to purchase whole or partial ownership shares of its locations, even assisting the managers to obtain financing. *Id.* at 52. *See also* BLAIR & LAFONTAINE, *supra* note 3, at 217 (noting that a franchisee will typically be much more

examining two dichotomies. First, franchisees are simultaneously quasi-independent managers[46] and also quasi-dependent small business owners.[47] Second, franchisees are both entrepreneurial[48] and risk adverse.[49]

On the one hand, franchisees often invest significant amounts of their own financial capital to purchase a franchise.[50] For this reason, franchisees, much like any other small business owner, have a direct and motivating financial incentive to make their location successful: they want to earn a return on their investment. In addition to the financial investment, franchisees typically make an investment of their time, insofar as most franchise agreements require franchisees to personally manage the daily operations of their location, which is usually done with very little direct supervision by the franchisor on a day-to-day basis.[51] In these ways, franchisees are both entrepreneurial and independent.

On the other hand, franchisees are also risk adverse and dependent. First, a franchisee must operate its location pursuant to the terms of the franchise agreement and strictly adhere to the franchisor's operating system.[52] More often than not, this includes being subject to periodic site inspections by the franchisor.[53] Such agreements might also involve obtaining the franchisor's approval before selecting a site for a new location and also adhering to franchisor-specified building and design specifications.[54] Franchisees often rely on advertising and marketing schemes promulgated by the franchisor.[55] Finally, franchisees have the added benefit of being able to seek guidance from the franchisor whenever problems arise.[56] In these ways, the franchisee's role involves a good deal of dependence on the franchisor.

Second, franchisees typically assume significantly less risk in starting their business than other small business owners.[57] In fact, the failure rate for franchised businesses is five percent compared to a failure rate of sixty-five to ninety percent for the average start-up business.[58] The primary reason for this is

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motivated than a typical company store manager since the franchisee "has his own money on the line").

46. *See* ULTIMATE BOOK, *supra* note 39, at 12-13.

47. *See* Stanworth, *supra* note 8, at 162.

48. *Id.*

49. *See* BOROIAN & BOROIAN, *supra* note 7, at 66-67; John L. Hanks, *Franchisor Liability for the Torts of Its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 OKLA. CITY U. L. REV. 1, 27 (1999).

50. ULTIMATE BOOK, *supra* note 39, at 13.

51. *Id.* at 2.

52. BLAIR & LAFONTAINE, *supra* note 3, at 54.

53. Stanworth, *supra* note 8, at 168. The frequency of inspections, however, can vary widely amongst franchisors. *Id.*

54. BLAIR & LAFONTAINE, *supra* note 3, at 79, 130-31.

55. *Id.* at 246.

56. BOROIAN & BOROIAN, *supra* note 7, at 17.

57. *Id.* at 66.

58. *Id.*; *but see* BLAIR & LAFONTAINE, *supra* note 3, at 42-46. Blair notes that some

that, to some extent, all business format franchising systems provide franchisees with operating manuals, training, periodic inspections, and, perhaps most importantly, advice.[59] Succinctly stated:

> For the franchisee it is a shot at attaining the American dream of owning a business—but with much of the risk removed. In effect, the franchisee is able to launch a new business without any of the attendant growing pains. Someone else has already made—and corrected—the most important mistakes, ironed out most of the wrinkles, and invented a system that works.[60]

In sum, one cannot accurately describe franchisees as wholly independent entities vis-à-vis franchisors, nor as glorified local managers.[61] The first assertion ignores the fact that the very existence and success of franchised locations is heavily dependent on an ongoing relationship with the franchisor and the use of the franchisor's business system.[62] The second assumption ignores the fact that franchisees take real financial risks in starting and managing the operations of their locations.[63]

D. The Benefits and Burdens of Being a Franchisor

The franchising relationship benefits franchisors in several ways. Most importantly, the franchisor does not have to expend the economic capital necessary to develop a national chain of outlets.[64] This allows the franchisor to get its product or service out to a large market quickly. In addition, franchisors benefit from the fact that franchisees typically have a better understanding of the local markets in which they operate.[65] Moreover, as compared to the typical company-employed manager, franchisees have a very strong built-in incentive to be profitable and efficient managers (i.e., franchisees want to make a return on

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commentators have challenged such statistics and report that the failure rate of franchised locations might, in fact, be the same or even higher than the rate for independent start-ups. *Id.* Nevertheless, the authors point out that, failure rates notwithstanding, well-established franchisors offer potential franchisees the opportunity to "start" a business that will have an immediately recognizable brand image, access to products and suppliers, managerial support, and access to the franchisor's operating system. *Id.* at 46. Thus, "while franchising is not risk free, it does make it possible for people who might otherwise not have this opportunity to develop a business locally and, with some luck, thrive as part of a larger business entity." *Id.*

59. BOROIAN & BOROIAN, *supra* note 7, at 17.

60. *Id.*

61. *See* BLAIR & LAFONTAINE, *supra* note 3, at 291-93.

62. *Id.*

63. *Id.*

64. BOROIAN & BOROIAN, *supra* note 7, at 28; *see generally* BLAIR & LAFONTAINE, *supra* note 3, at 56-78.

65. BOROIAN & BOROIAN, *supra* note 7, at 52.

their monetary investments).[66]

Second, the franchise relationship allows franchisors to enjoy a steady and continuous stream of income from each franchised location.[67] Franchisors extract both an upfront franchising fee as well as ongoing royalties, which can range from more than 12.5% of sales at McDonald's to as low as four percent at Arby's.[68] Additionally, some franchisors enjoy additional streams of income by retaining ownership of the land and buildings used by franchisees and charging them rent.[69]

The franchising model also brings some trade-offs for the franchisor. The primary trade-off comes in the form of a loss of rigorous control over daily operations.[70] Boroian has described the situation as follows: "[The franchisor's] role in the day-to-day operation of the franchisee's business is more that of a grandparent than a parent. [The franchisor is] there when needed for advice and counsel, but [the franchisor does not] have the day-to-day responsibility for direct management."[71]

Since consistency and uniformity of operations play such a central role in modern business format franchising, franchisors have a legitimate concern that a wayward franchisee might do considerable harm to the franchisor's brand image and, consequently, to its ultimate profitability.[72] While the franchisor's overall success depends largely on the uniform quality of products and services offered at each location, individual franchisees might be pulled by an opposite incentive.[73] For instance, a franchisee whose customer base is largely transient (e.g., a fast food restaurant located near a major interstate) might be motivated to increase profits by utilizing lower quality products and service, thereby capitalizing on the brand to attract customers while not suffering the

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66. *Id.*

67. BLAIR & LAFONTAINE, *supra* note 3, at 56.

68. ULTIMATE BOOK, *supra* note 39, at 274, 320. The average royalty rate in 2001 was 5.2%. BLAIR & LAFONTAINE, *supra* note 3, at 66. Nevertheless, royalties can range from flat yearly fees in some franchise relationships to royalties of more than twenty percent in some low-overhead industries. *Id.* at 65-66.

69. This is especially true for McDonald's, the largest retail property owner in the world. ERIC SCHLOSSER, FAST FOOD NATION 4 (2001). In fact, McDonald's earns more collecting rent on its properties than it does selling burgers. *Id.*

70. BOROIAN & BOROIAN, *supra* note 7, at 61-62.

71. *Id.* at 52; *see also* Stanworth, *supra* note 8, at 169. In reviewing both the language of franchise agreements as well as conducting interviews with franchisors and franchisees, this study concluded that, although provisions of the agreement were often very restrictive of franchisees, in practice franchisees more often described the relationship with their franchisors as one of give and take and semi-autonomy rather than close supervision. *Id.* 163-66. This is not to say, however, that franchisors do not occasionally exercise very tight control over a particular franchised location when problems arise. *Id.* at 169.

72. *See generally* BLAIR & LAFONTAINE, *supra* note 3, at 118-21.

73. *Id.*

consequences of dissatisfied customers.[74] Such behavior would ultimately be detrimental to other franchisees and, consequently, to the franchisor.

Perhaps it is just for this reason that many franchisees report that franchise agreements have become more strict and more strictly enforced with time.[75] Most franchisors retain the right to periodically inspect franchised locations to ensure compliance with the franchise agreement and business system.[76] Additionally, many franchisors require that franchisees attend franchisor-sponsored training prior to operating their own location.[77] In the end, however, the franchisor's ability to control the franchisee's operations is most striking in the franchisor's retained right to terminate the relationship if the franchisee's performance is inadequate.[78] Thus, although the franchisor does not directly manage daily operations, the franchisor holds an impressive club with which to control and punish wayward franchisees that deviate significantly from the franchisor's wishes.[79]

II. THEORIES OF FRANCHISOR VICARIOUS LIABILITY IN THE CASE LAW

A. Introduction

Title VII of the Civil Rights Act of 1964 (the "Act") prohibits employers from discriminating against employees and applicants for employment on the basis of sex.[80] Thus, the Act specifically requires that discrimination against an

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74. *Id.*

75. Stanworth, *supra* note 8, at 174.

76. *Id.* at 168.

77. The amount of training required varies by franchisor. For example, McDonald's requires one week of training at the company's headquarters followed by one to two years of training at a local store. ULTIMATE BOOK, *supra* note 39, at 274. Jackson Hewitt Tax Service requires five days of training at company headquarters followed by two days of regional training. *Id.* at 211.

78. BLAIR & LAFONTAINE, *supra* note 3, at 269.

79. *Id.*

80. 42 U.S.C. §2000e-2(a) (2000). The provision states:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individuals race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. As noted previously, the Supreme Court held in the case of *Meritor Savings Bank, FSB v.*

employee be attributable to his or her employer before a cognizable claim comes into existence. Generally, Title VII defines an employer as one who employs at least fifteen people.[81]

The question then becomes can the franchisor be considered, for the purpose of bringing a Title VII claim, the employer of its franchisee's employees? Courts in different jurisdictions have split when deciding this issue. The biggest challenge, of course, is finding a legal tie between the franchisor and the franchisee that would allow liability for discrimination claims to pass from the franchisee, as the employee's direct employer, to the franchisor through its close relationship with the franchisee.

Courts have struggled with various theories of vicarious liability when plaintiffs attempt to establish such a connection. The concept of vicarious liability allows legal fault to be attributed to a party who neither directly acted to cause the victim's damages nor failed to act when he or she had a duty to do so.[82] At first glance, this principle seems a bit unfair, for it goes against many basic notions about tort liability (i.e., that a person should only be held liable when he or she is directly at fault).[83]

Nevertheless, various justifications have been offered in support of vicarious liability. For instance, it can be argued that when one party chooses another as his or her representative, that party should be held accountable if he or she chooses a poor representative.[84] Alternatively, one might argue that a person and his or her representative can best be described as a single or unitary enterprise and that the person who stands to benefit from his or her representative's actions should also bear the loss of the representative's actions which result in harm to others.[85] On broader public policy grounds, vicarious liability has another important justification, the principle of loss distribution.[86] When principal actors are held liable for the actions of their servants, agents, or employees, and particularly when those actors are businesses, the costs of tort judgments are effectively stretched thinly across a large portion of the public rather than forcing any one individual to bear the often debilitating costs of a single tort claim.[87]

This Note addresses three of the most common theories of vicarious liability used in the franchising cases. Most often, a court examines the issue through the lens of agency theory.[88] Briefly, agency is a legal relationship between two

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Vinson, 477 U.S. 57, 66-67 (1986), that the term discrimination under Title VII includes sexual harassment.

81. 42 U.S.C. § 2000e(b) (2000).

82. P. S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS 3, 12 (1967).

83. *Id.* at 12.

84. *Id.* at 19.

85. *Id.* at 19-20.

86. *Id.* at 23.

87. *Id.* This cost spreading usually takes the form of higher insurance premiums for businesses as well as slightly increased costs to the individual consumer for the goods and services produced by those businesses. *Id.*

88. The statutory language of Title VII seems to support this approach in particular. Under

parties, most often formed by an agreement, which allows one party (i.e., the agent) to act on behalf of and, consequently, affect the legal position of the other party (i.e., the principle) with respect to third parties.[89] Under this approach, the court must determine whether the franchisee is the agent of the franchisor before the franchisor may be held liable.

More recently, two additional approaches have been used by some courts to address franchisor vicarious liability. One of these approaches is the employer-independent contractor model found in the Restatement (Second) of Torts.[90] The other approach is the single employer test, which was first developed by the National Labor Relations Board for use in resolving labor disputes.[91] Under these models, the court must determine, respectively, whether the franchisor employs the franchisee as an independent contractor or whether the franchisor and franchisee qualify as a "single employer."

B. Agency Theory

Although a franchisor and franchisee function in most respects as separate legal entities, a franchisor might be held liable for the acts of its franchisee, particularly if a court finds that the franchisee was acting as the franchisor's agent. The franchisor's right to control the franchisee is the key factor examined when making such a determination.[92] In fact, "[u]nder the right to control test it does not matter whether the putative principal actually exercises control; what is important is that it has the right to do so."[93]

There are two primary forms of agency.[94] Typically an agency relationship arises after two parties have entered into some form of a consensual agreement.[95] The Restatement defines "agency" as:

> the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. The one for whom action is to be taken is the principal. The one who is to act is the agent.[96]

This form of agency is often referred to as actual agency, as opposed to the

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42 U.S.C. §2000e(b) (2000), an employer's *agents* are also considered its employees.

89. G.H.L. FRIDMAN, THE LAW OF AGENCY 8-9 (1966).

90. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

91. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1069 (10th Cir. 1998); Alberter v. McDonald's Corp., 70 F. Supp. 2d 1138, 1142 (D. Nev 1999). Both cases are discussed in greater detail below.

92. Miller v. McDonald's Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997); *see also* Butler v. McDonald's Corp., 110 F. Supp. 2d 62, 66 (D.R.I. 2000).

93. *Miller*, 945 P.2d at 1110 n.3; *see also* Billops v. Magness Const. Co., 391 A.2d 196, 197-98 (Del. 1978).

94. FRIDMAN, *supra* note 89, at 33.

95. *Id.*

96. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

related concept of apparent agency (or agency by estoppel).[97]

Under the doctrine of apparent agency, no overt agreement is required.[98] Rather, such a relationship arises when the words or acts of one party (the putative principal) vis-à-vis another party (the putative agent) lead outsiders to believe that an agency relationship exists.[99] If an outsider to the relationship detrimentally relies on such a belief, the doctrine holds that the putative principal will be treated as if the agent had acted with the principal's consent.[100] Courts that utilize the agency approach often address both actual and apparent agency.

1. Actual Agency Found.—In *Miller v. D.F. Zee's, Inc.*,[101] the court held that Denny's, in its capacity as franchisor, was responsible for acts of harassment perpetrated by the franchisee's managers and supervisors through a theory of agency.[102] Although the franchise agreement contained an explicit provision stating that the franchisee was not the franchisor's agent, the court held that such a provision was not by itself dispositive.[103] The court noted several factors which led it to find that the franchisor had retained sufficient control over the franchisee to justify a finding of an actual agency relationship. First, "the franchise agreement require[d] adherence to comprehensive, detailed manuals for the operation of the restaurant."[104] Second, the agreement required strict compliance and allowed for termination of the agreement by the franchisor.[105] Third, the agreement allowed the franchisor to control training and discipline of

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97. FRIDMAN, *supra* note 89, at 33.

98. *Id.* at 61.

99. *Id.*

100. *Id.*; *see also* Miller v. McDonald's Corp., 945 P.2d 1107, 1112 (Or. Ct. App. 1997); RESTATEMENT (SECOND) OF AGENCY § 267 (1958). The Restatement defines apparent agency as follows:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Id.

101. 31 F. Supp. 2d 792 (D. Or. 1998). Several employees of a Denny's restaurant sued the local franchisee (D.F. Zee's) and the franchisor (Denny's, Inc.) alleging, inter alia, sex discrimination and harassment under Title VII. *Id.* at 797. The court noted thirty-two separate incidents of sex discrimination, sexual harassment, and retaliation perpetrated by supervisors, co-workers, and upper management at the local Denny's location. *Id.* at 800-01. The franchisor moved for summary judgment claiming it could not be liable under Title VII since it did not employ the plaintiffs. The court denied the motion. *Id.* at 797.

102. *Id.* at 806.

103. *Id.* at 807; *see also Miller*, 945 P.2d at 1109; *but see* Alberter v. McDonald's Corp., 70 F. Supp. 2d 1138 (D. Nev. 1999); Kennedy v. Western Sizzlin Corp., 857 So. 2d 71, 78 (Ala. 2003).

104. *D.F. Zee's*, 31 F. Supp. 2d at 806-07.

105. *Id.* at 807.

employees.[106] In fact, all franchisees and their managers were required to attend the franchisor's training, which included diversity and non-discrimination components.[107] Finally, the company's operations manual specifically allowed the franchisor to be involved directly with complaints, investigation, and discipline as a result of a franchisee employee's claims of discrimination.[108]

Even in suits not related to employee sexual harassment or discrimination claims, courts have used similar rationales to justify findings of an agency relationship between a franchisor and franchisee. For instance, in *Miller v. McDonald's Corp.*,[109] the court held that a reasonable jury could find that McDonald's retained sufficient control over its franchisee's daily operations to indicate the existence of an actual agency relationship.[110] The company's manuals and franchise agreement went beyond simply setting standards insofar as they laid out precise methods for food handling and preparation, and the franchisor sent inspectors to monitor the franchisee and to ensure compliance.[111] Moreover, the franchisor retained the right to terminate the relationship.[112] The court also noted several other factors justifying a finding of actual agency; the agreement included provisions governing the franchisee's hours of operation, restaurant appearance and cleanliness, employee uniforms, food containers and packaging, food and beverage ingredients, and training standards.[113]

In another case, *Butler v. McDonald's Corp.*,[114] the court held that a "no agency" provision inserted into a franchise agreement is not controlling.[115] Moreover, the court stated that the comprehensive McDonald's system, as evidenced in the agreement and operating manuals and enforced through frequent inspections and the franchisor's right to terminate the agreement, along with the

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106. *Id.*

107. *Id.*

108. *Id.*

109. 945 P.2d 1107 (Or. Ct. App. 1997). A customer bit into a Big Mac containing a sapphire stone and sustained injuries. *Id.* at 1108. She sued the local franchisee (3-K Restaurants) as well as the franchisor (McDonald's Corp.). Although the trial court granted the franchisor's motion for summary judgment on the grounds that the franchisor neither owned nor operated the local restaurant, the Oregon Court of Appeals reversed. *Id.*

110. *Id.* at 1111.

111. *Id.*

112. *Id.*

113. *Id.* at 1109.

114. 110 F. Supp. 2d 62 (D.R.I. 2000). In this case, a fast food restaurant customer pushed against a glass door, which shattered, causing serious injury. *Id.* at 64. The customer sued both the franchisee (Cooper) and the franchisor (McDonald's Corp.) under a theory of negligence, alleging that a crack had existed for two weeks and that the restaurant knew or should have known about it and corrected the problem. *Id.* The franchisor moved for summary judgment claiming, inter alia, that it was not vicariously liable for the negligence of its franchisee. *Id.* However, the court denied the motion. *Id.* at 68.

115. *Id.* at 67. "However, a party cannot simply rely on statements in an agreement to establish or deny agency." *Id.*

franchisor's taking of profits from the franchisee's operations supported a finding that the franchisor retained sufficient control over its franchisee to justify a finding of an agency relationship.[116]

2. No Actual Agency Found.—Although the cases discussed above demonstrate an emerging trend towards finding franchisors liable for the acts of franchisees under agency theory, many courts remain reluctant to find that franchisors retain enough control over their franchisees to justify a finding of an agency relationship. For instance, in *Kennedy v. Western Sizzlin Corp.*,[117] the Alabama Supreme Court held that the existence of "[a] franchise agreement, without more, does not make the franchisee an agent of the franchisor."[118] As in the previously discussed cases, this court focused on whether the franchisor retained a right of control over the franchisee as an alleged agent. However, here the court noted that a franchisor's retention of a right to supervise its franchisee merely to determine if the franchisee's performance is in conformance with the agreement is not enough to establish the necessary level of retained control.[119]

In this case, the franchise agreement required the franchisee to comply strictly with the franchisor's operations manual, and it gave the franchisor the right to inspect regularly the franchisee's restaurant without notice.[120] The agreement also required franchisees to attend training provided by the franchisor.[121] Nevertheless, the court held that the operations manual, right of inspection, and training requirements did not rise to a level indicating that the franchisor actually controlled daily operations; the franchisor's "control was limited to ensuring that [the franchisee] complied with the franchise agreement and, in turn, the operations manual."[122] In essence, the court drew a distinction between ensuring compliance with a comprehensive set of guidelines and actually carrying out those guidelines on a daily basis.

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116. *Id.* at 66-67. Although it is difficult to imagine a case in which a franchisor would not oppose a finding of an agency relationship between itself and its franchisee, see *Martin v. McDonald's Corp.*, 572 N.E.2d 1073 (Ill. App. Ct. 1991). In that case, the franchisor argued that the franchisee was in fact its agent and, thus, the franchisee's employees were also its employees for purposes of the state's Workers' Compensation Act. *Id.* at 1080.

117. 857 So. 2d 71 (Ala. 2003). The plaintiffs alleged that one of the franchisee-partners committed forcible rape, unwanted sexual touching, and inappropriate sexual remarks. *Id.* at 73 n.1. The franchisee-partner (Lambert) had previously been terminated from his position as a district manager at Waffle House after claims of sexual harassment were made against him. *Id.* Lambert had also been convicted of criminal attempted sexual abuse. However, it is unclear from the opinion whether this conviction arose from the Waffle House incident or was in addition to it. *See id.*

118. *Id.* at 77.

119. *Id.*

120. *Id.* at 76.

121. *Id.* at 75-76. The scope of the operations manual was quite broad and included, among others, provisions relating to management and personnel, payroll procedures, training, safety and sanitation, uniforms, and hours of operation. *Id.*

122. *Id.* at 77.

3. Apparent Agency Found.—The franchising model's focus on creating a uniform brand image makes it vulnerable to attack when viewed through the lens of the apparent agency test.[123] Specifically, when a franchisor is successful in selecting and monitoring its franchisees, members of the general public should not be able to tell a difference between a location that is owned by an individual franchisee versus one owned by the franchisor itself.[124] That is to say, an effective franchise operation creates an image of uniformity and consistency across its locations.[125] It is exactly this image of uniformity and consistency which is at the core of the franchising model's success because it functions to build a loyal customer base.[126]

For instance, returning to the case of *Miller v. D.F. Zee's, Inc.*,[127] the court held that, in addition to the existence of an actual agency relationship between Denny's and its franchisee, there was sufficient evidence to create an issue of fact as to whether an apparent agency relationship existed as well.[128] The court noted that the Denny's trademark and logos were prominently displayed on employees' uniforms as well as restaurant signs and menus.[129] Moreover, all advertising for the company's franchised locations was done at an institutional level (with no right of control by franchisee).[130]

These findings gave rise to a genuine issue of fact as to whether the franchisor's actions created an impression in the minds of outsiders that the franchisee acted under the franchisor's apparent authority.[131] Moreover, since the employees were told explicitly that they were Denny's employees and because they had no reason to believe otherwise, the court held that there was also an issue of fact as to whether or not the employees justifiably believed that an agency relationship existed.[132]

Similarly, in *Miller v. McDonald's Corp.*,[133] the court found that the situation presented a sufficient issue of fact for the jury as to whether McDonald's held out its franchisee as an agent.[134] Once again, the franchisee was required to

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123. Jeffrey A. Brimer & Bryan C. Bacon, *Franchisor Liability for Gender Discrimination and Sexual Misconduct*, 20 FRANCHISE L.J. 188, 192 (2001).

124. BLAIR & LAFONTAINE, *supra* note 3, at 117.

125. *Id.*

126. *Id.*

127. 31 F. Supp. 2d 792 (D. Or. 1998).

128. *Id.* at 807.

129. *Id.* at 808.

130. *Id.*

131. *Id.* at 807.

132. *Id.* at 808. Although the court found only that the plaintiffs presented enough facts to defeat the franchisor's motion for summary judgment (and not necessarily to be successful at trial), it is interesting to note that this action was dismissed by the court shortly after this decision was announced because the parties had entered into settlement negotiations. *See* Docket Entry 197, Miller v. D.F. Zee's, 31 F. Supp. 2d 792 (D. Or. 1998) (No. 96-CV-01170).

133. 945 P.2d 1107 (Or. Ct. App. 1997).

134. *Id.* at 1113. The court went on to find:

comply with a "common image" created through "national advertising, common signs and uniforms, common menus, common appearance, and common standards."[135] Interestingly, the court noted that a sign posted in the restaurant stating that the location was owned by a franchisee was not, by itself, enough to defeat a finding of apparent agency.[136]

Finally, in *Butler v. McDonald's Corp.*,[137] the court echoed these sentiments, finding that when a franchisor creates an impression of uniformity by engaging in national advertising and using highly visible logos and recognizable employee uniforms, it acts "in [a] manner that would lead a reasonable person to conclude that the [franchisee] and/or employees of the franchise restaurant [are] employees or agents of the [franchisor]."[138] That is to say, the franchisor, by its own actions, encouraged outsiders to believe that they were dealing with the franchisor whenever they dealt with the franchisee. Whether an outsider's belief that the franchisee acts with the franchisor's apparent authority is genuine and justifiable always becomes a question of fact for the jury. However, the court noted that in this case, such a finding arguably would be reasonable.[139]

4. No Apparent Agency Found.—In other jurisdictions, however, a plaintiff might find that the bar is set significantly higher for establishing apparent agency. For instance, the court in *Kennedy v. Western Sizzlin Corp.*,[140] when viewing facts very similar to those in *D.F. Zee's*, *Miller*, and *Butler*, found that the franchisor did nothing to create an appearance of authority in the franchisee; in fact, the court noted that the franchise agreement contained an explicit no agency provision.[141] Making no mention of advertising schemes, logos, employee uniforms, or other potential indicia of apparent agency, the *Kennedy* court attributed a great deal of weight to this contractual provision, which expressly prohibited the franchisee from doing anything that would create an impression of agency.[142] For this court, no amount of reasonable, justifiable, and detrimental reliance on the part of an outsider can serve to create a claim of apparent agency when the franchise agreement expressly prohibits the franchisee

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> [T]he franchise agreement require[s] the franchisee to act in ways that identif[y] it with the franchisor. The franchisor impose[s] those requirements as part of maintaining an image of uniformity of operations and appearance for the franchisor's entire system. Its purpose [is] to attract the patronage of the public to that entire system. The centrally imposed uniformity is the fundamental basis for the courts' conclusion that there [is] an issue of fact whether the franchisors h[o]ld the franchisees out as the franchisors' agents.

Id. at 1112-13 (citation omitted).

135. *Id.* at 1113.

136. *Id.*

137. 110 F. Supp. 2d 62 (D.R.I. 2000).

138. *Id.* at 69-70.

139. *Id.* at 70.

140. 857 So. 2d 71 (Ala. 2003).

141. *Id.* at 78.

142. *Id.*

from acting as an agent.[143]

C. Employer-Independent Contractor

Although many jurisdictions traditionally have relied on the principal-agent analysis to determine whether or not a franchisor is liable for the acts of its franchisee, some jurisdictions have employed other tests.[144] One such test is the employer-independent contractor analysis which can be found in the Restatement (Second) of Torts.[145]

The difference between an agent and an independent contractor can often be difficult to identify.[146] Both agents and independent contractors have the ability to affect the legal position of the principal, and, in many instances, the terms can be used synonymously.[147] Moreover, courts who utilize the employer-independent contractor model focus primarily on the extent to which the franchisor retained control over the franchisee's operations, much like courts that use the agency approach.[148] Finally, as the case below indicates, many courts traditionally have been unwilling to impose liability upon franchisors for the acts of their franchisees even under the employer-independent contractor approach.[149]

For example, in *Hoffnagle v. McDonald's Corp.*,[150] the court held that a franchisor did not retain enough control over the daily operations of its franchisee's restaurant (specifically its security procedures) to warrant

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143. *Id.* at 78 n.3.

144. *See, e.g.*, Coty v. U.S. Slicing Mach. Co. Inc., 373 N.E.2d 1371, 1374-76 (Ill. App. Ct. 1978).

145. RESTATEMENT (SECOND) OF TORTS § 414 (1965) states:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

146. FRIDMAN, *supra* note 89, at 18.

147. *Id.* at 21.

148. *Compare* Miller v. McDonald's Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (pointing out that the *agency* analysis turns on the franchisor's retained right to control its franchisee), *with* Hoffnagle v. McDonald's Corp., 522 N.W.2d 808, 813 (Iowa 1994) (noting that the *independent contractor* analysis turns on issues of retained control).

149. *See, e.g.*, *Hoffnagle*, 522 N.W.2d at 814; *Coty*, 373 N.E.2d at 1375-76.

150. 522 N.W.2d at 808. A McDonald's employee sued both the franchisee (Rapid-Mac, Inc.) and the franchisor (McDonald's Corp.) for injuries suffered after being assaulted by a third party while at work. *Id.* at 810. Two men entered the restaurant, dragged the plaintiff out of the restaurant, and attempted to put her in their car. *Id.* The manager on duty intervened and foiled the attempt by bringing the employee back into the restaurant. *Id.* The men remained in the parking lot. However, the manager did not call the police or lock the doors. *Id.* Subsequently, the men returned and again attempted to take the plaintiff out of the restaurant. *Id.* Once again, the manager intervened and the men left. *Id.* This time the manager called the police. *Id.*

liability.[151] Echoing the sentiments of the court in *Kennedy*, this court stated that "[t]he general right of supervision by the franchisor to see that business is conducted in a generally uniform manner cannot mean the franchisor . . . is responsible . . . " for the acts of its franchisee.[152] The court's analysis focused on section 414 of the Restatement (Second) of Torts,[153] under which its decision "turn[ed] on the extent of the franchisor's retained control over the property and the daily operations of the restaurant . . . ."[154] The court continued, stating that "McDonald's simply ha[d] the authority to require the franchisee to adhere to the 'McDonald's system,' to adopt and use McDonald's business manuals, and to follow other general guidelines outlined by McDonald's."[155] Moreover, the court emphasized that the franchisee controlled the daily operations of the restaurant, such as wage setting, daily training, and hiring, firing, supervising, and disciplining its employees.[156]

D. Single Employer

In addition to the agency and employer-independent contractor approaches, a third test has become popular in some jurisdictions and especially within the federal courts of appeal.[157] The single employer test was originally developed by the National Labor Relations Board (NLRB) for use in resolving labor disputes. However, it has been applied subsequently by the Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits in Title VII cases.[158]

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151. *Id.* at 814.

152. *Id.* at 815.

153. *Id.* at 813. The court also addressed section 344, since the plaintiff raised the issue in her argument. In this case, McDonald's was not only a franchisor but also owned the land and leased it to the franchisee. Section 344 states:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

RESTATEMENT (SECOND) OF TORTS § 344 (1965). The court went on to say that an analysis under section 414 was, nevertheless, preferable. *Hoffnagle*, 522 N.W.2d at 813. Under either section, the analysis turns on the amount of control the principal exercises. In the case of section 344, it is control exercised over the property, while under section 414 it is control exercised over the daily operations of the business. *Id.*

154. *Id.*

155. *Id.* at 814.

156. *Id.*

157. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1070 (10th Cir. 1998); Alberter v. McDonald's Corp., 70 F. Supp 2d 1138, 1142 (D. Nev. 1999) (both discussed below).

158. *Lockard*, 162 F.3d at 1070; Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994);

The test has four factors: interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control.[159] Of the four factors, however, "[t]he key factor . . . is . . . whether the putative employer has centralized control of labor relations."[160] More specifically, such control must be over the *daily employment decisions* of the franchisee.[161]

For example, in *Lockard v. Pizza Hut, Inc.*,[162] although the franchisor had published policy statements, complaint procedures, and a training handbook, each of which addressed sexual harassment and were used by all Pizza Hut locations,[163] the court held that this was insufficient to satisfy the control requirement under the second prong of the single employer test.[164] Even though the franchisee's employees were encouraged to contact the franchisor's officials for assistance with sexual harassment claims,[165] the court declared that the plaintiff had failed to demonstrate how the franchisor controlled day-to-day employment decisions, that is, "what role, if any, Pizza Hut played in *implementing* or *effecting* these policies."[166]

In *Alberter v. McDonald's Corp.*,[167] the court also focused on the centralized control of labor relations prong, stating that the key focus should be on "which business entity had the power to make employment decisions with respect to the

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Morgan v. Safeway Stores, Inc., 884 F.2d 1211, 1213 (9th Cir. 1989); Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Baker v. Stuart Broad. Co., 560 F.2d 389 (8th Cir. 1977); *Alberter*, 70 F. Supp. 2d at 1142 (citing Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995)).

159. *Lockard*, 162 F.3d at 1070.

160. *Id.*

161. *Id.*

162. 162 F.3d 1062 (10th Cir. 1998). A Pizza Hut waitress sued both the franchisee (A & M Food Service, Inc.) and the franchisor (Pizza Hut, Inc.) under Title VII for sexual harassment (hostile work environment). The plaintiff's claim arose when two customers made repeated sexually offensive comments on one visit and physical contact with her on a subsequent visit. *Id.* at 1067. The waitress informed her supervisor, who ordered her to wait on the men nevertheless. *Id.* Upon returning to the table, one of the men grabbed her breast and put his mouth on it. *Id.* The jury found both the franchisor and the franchisee liable and awarded the plaintiff over $200,000 in compensatory damages and costs. *Id.* at 1068. On appeal, this court affirmed the judgment against the franchisee but reversed the judgment against the franchisor. *Id.* at 1077.

163. *Id.* at 1066.

164. *Id.* at 1071.

165. *Id.* at 1066.

166. *Id.* at 1071 (emphasis added).

167. 70 F. Supp. 2d 1138 (D. Nev. 1999). A fifteen-year-old McDonald's employee sued the franchisee (Ledbetter/McDonald's of Lemmon Valley) and the franchisor (McDonald's Corp.) under Title VII for sex discrimination and sexual harassment. *Id.* at 1140. The employee's claim arose when a manager at the restaurant made repeated gender based epithets and physically touched and confined the employee. *Id.*

person claiming discrimination."[168] Amongst other things, the franchisee was responsible for paying employees, establishing personnel policies, hiring and firing employees, employee discipline, employee performance evaluations, training, and approval of time off.[169] The franchise agreement incorporated by reference several operating manuals that the franchisee was required to follow.[170] However, the franchisee had the explicit option of not using the personnel manual created by the franchisor and instead could establish his own personnel policies.[171] As a result, the court held that the franchisor did not have sufficient control over the franchisee's labor relations to give rise to liability for the franchisor.[172]

E. Summary

Regardless of which analytical framework a particular jurisdiction uses, whether it is the agency model, the employer-independent contractor approach, or the single employer test, control is the key factor examined by the courts when determining if a franchisor should be held vicariously liable for the tortious acts of its franchisee.[173] The majority of courts have traditionally turned a skeptical eye towards a plaintiff who attempts to recover from a franchisor for damages resulting from the acts of a franchisee.[174] Nevertheless, a distinct trend has emerged in some jurisdictions that is notably more sympathetic to the plight of the injured plaintiff.[175]

The result is that franchisors have found themselves in a "catch 22." In those jurisdictions that are more apt to impose vicarious liability, franchisors actually have a compelling incentive to take a more active role in supervising the operations of their franchisees in order to limit potential exposure for future claims, including claims arising under Title VII for sexual harassment and discrimination. On the other hand, in those jurisdictions that follow the more traditional approach and are less likely to impose vicarious liability, franchisors continue to be compelled to do just the opposite. That is, they have a good

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168. *Id.* at 1143.

169. *Id.* at 1144.

170. *Id.*

171. *Id.* at 1144-45.

172. *Id.* at 1145. The court went on to explore the franchisor's liability under agency principles. The court noted that the franchise agreement contained a "no agency" provision, and the court therefore held that the franchisor had not consented to the franchisee acting as its agent and could not be liable under the agency approach. *Id. Cf.* Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792, 807 (D. Or. 1998); Miller v. McDonald's Corp., 945 P.2d 1107, 1109 (Or. Ct. App. 1997).

173. Shelley & Morton, *supra* note 12, at 19-20; *see also* FRIDMAN, *supra* note 89, at 18.

174. *See* Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998); *Alberter*, 70 F. Supp. 2d at 1138; Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003); Hoffnagle v. McDonald's Corp., 522 N.W.2d 808 (Iowa 1994).

175. *See* Butler v. McDonald's Corp., 110 F. Supp. 2d 62 (D.R.I. 2000); *D.F. Zee's, Inc.*, 31 F. Supp. 2d at 792; *Miller*, 945 P.2d at 1107.

reason not to get involved with any effort to prevent or investigate incidents of sex discrimination or harassment, since such action could tip the balance and lead a court to find that the franchisor exercised enough control over the franchisee to justify liability. The problem, of course, is that franchisors, by their nature, often operate across jurisdictional lines.

III. ARGUMENTS AGAINST HOLDING FRANCHISORS VICARIOUSLY LIABLE

A. Shoehorning Franchising into the Agency Model

Some commentators have strongly criticized the "perplexing" state of affairs that has resulted from cases such as those described above.[176] "If anything emerges from the case law, it is that there is no litmus test."[177] Whether it is a case of "some courts . . . stretching general theories of liability"[178] to allow injured parties to collect from the deepest pockets[179] or that "courts have lagged behind the real world in their understanding of the franchise business concept,"[180] the result is that franchisors are left wondering to what extent they may be held liable for the acts of their franchisees.

At its core, the franchising model is based on the concept of uniformity.[181] In general, most of the commentators addressing the issue have posited that the courts have failed to distinguish the type of control that traditionally has given rise to vicarious liability from the type of control that a franchisor must exercise to ensure that its franchise operations are uniform.[182] One of the most important characteristics of a successful franchise system is that an outsider sees no difference between one location and another.[183] "This is what franchising is all about—finding a business model that works and then insisting that each franchise adhere religiously to the model."[184]

Without uniformity and consistency of operations, a franchise system would be little more than a very loose collection of small business owners.[185] Customers could no longer rest assured that the same quality of products or services would be offered at their favorite fast food restaurant, hotel, or gas

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176. Randall K. Hanson, *The Franchising Dilemma Continues: Update on Franchisor Liability for Wrongful Acts by Local Franchisees*, 20 CAMPBELL L. REV. 91, 92 (1997).

177. Brimer & Bacon, *supra* note 123, at 194.

178. *Id.*

179. Gregory J. Ellis & Beth Anne Alcantar, *Franchisor Liability for the Criminal Acts of Others*, 18 FRANCHISE L.J. 11 (1998); Hanson, *supra* note 176, at 92; Shelley & Morton, *supra* note 12, at 121.

180. Shelley & Morton, *supra* note 12, at 120. Shelley describes the application of agency theory to franchising as "antiquated, silly, and absurd." *Id.* at 119.

181. *Id.* at 121. This concept was discussed more fully *supra* Part II.

182. *See* Killion, *supra* note 12, at 164.

183. *Id.*

184. *Id.*

185. Shelley & Morton, *supra* note 12, at 121.

station when traveling away from home, or even when visiting different locations within the same city. In fact, they might not even recognize the restaurant, hotel, or gas station if each franchised location were permitted to control the appearance of its building and signage. Therefore, some form of franchisor control over system uniformity is absolutely vital to the franchising model's success.[186]

When courts such as those in *D.F. Zees* and *Miller* are confronted with a franchise relationship in which the agreement commands strict compliance with detailed operational manuals, allows for frequent and unannounced franchisor inspections, prescribes the details of building design and site selection, requires attendance at franchisor-sponsored training events, mandates the use of highly visible and recognizable logos and trademarks, and allows the franchisor to terminate the franchising relationship, they see factors which convincingly indicate that the franchisor has retained sufficient control over the operations of its franchisee to justify the imposition of vicarious liability.[187] By the same token, however, such findings force franchisors to walk a "tightrope."[188] If their franchise systems are to be successful, franchisors must exercise control over their franchisees to ensure uniformity; however, franchisors now face the reality that exercising such control might make them liable for the franchisee's transgressions.[189]

B. Some Recommendations from the Commentators

Commentators have suggested a number of recommendations aimed at ameliorating the "catch 22" that arises from cases such as *D.F. Zees* and *Miller*. Some of these suggestions are nominal at best. For instance, several commentators have recommended that franchisees be required to post signs that indicate that their location is independently owned and operated.[190] Moreover, these commentators recommend that franchise agreements should refer to the independent status of franchisees and expressly reject any inference of an agency

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186. *Id.* at 120. Note also that the Lanham Act, 15 U.S.C. §§ 1051-1141n (2000), requires owners of trademarks, such as franchisors, to "maintain[] sufficient control of the licensee's use of the mark to assure the nature and quality of goods or services that the licensee distributes under the mark." Joseph Schumacher et al., *Retaining and Improving Brand Equity by Enforcing System Standards*, 24 FRANCHISE L.J. 10 (2004). If a franchisor "under-polices" its trademark, then it risks losing its federal registration. *Id.* However, "over-policing" the trademark can easily result in a finding of franchisor liability if a court finds that the franchisor was thereby asserting too much control over its franchisee. Ellis & Alcantar, *supra* note 179, at 12.

187. Killion notes, "Typical franchisor controls can look pervasive to judges, lawyers, and jurors who are not schooled in modern franchising." Killion, *supra* note 12, at 165.

188. Hanson, *supra* note 176, at 112.

189. *Id.*

190. *Id.*; Ellis & Alcantar, *supra* note 179, at 17; Shelley & Morton, *supra* note 12, at 127. Shelley urges that this information not only be included on signs but also on letterhead, contracts, and business cards. *Id.*

relationship between the franchisor and the franchisee.[191]

Jeffrey Brimer and Bryan Bacon suggest that franchisors should continue to assist their franchisees to prevent and reduce the occurrence of situations that might give rise to liability by providing training and advice and creating guidelines.[192] They go on to state, "seemingly no amount of advice will push the franchisor into an agency relationship with its franchisee."[193] Given the current state of the case law, however, a franchisor's ability to rely on such a statement seems questionable at best.[194] It seems unlikely that courts such as the ones in *D.F. Zees* and *Miller* would be swayed by the posting of a sign indicating independent ownership[195] or a provision in the agreement expressly rejecting an agency relationship between the franchisor and its franchisee.[196]

Another commentator, attorney William Killion, has recommended that the existing "right to control" test, as applied to franchisors, should be narrowed to focus only on whether the franchisor retained a right to control the actual instrumentality which led to a third person's harm.[197] For example, in a case involving a franchisee who sexually harassed an employee, the court would focus not on whether the franchisor generally had the right to control its franchisee but rather on whether, and to what extent, the franchisor specifically had a right to control the franchisee's employment policies and practices.[198] This revised approach focuses more acutely on whether the franchisor assumed a specific duty to the injured party and, subsequently, if that duty was breached.[199] In this way, the new test looks more like a negligence inquiry rather than one of vicarious

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191. Ellis & Alcantar, *supra* note 179, at 17; Hanson, *supra* note 176, at 112. In addition, Shelley recommends that franchisors review the language of their operations manuals and franchise agreements and modify any provisions that might give rise to an inference that the franchisor is exercising, or has the right to exercise, day-to-day control over the franchisee. Shelley & Morton, *supra* note 12, at 127. Provisions which are not absolutely necessary to the franchisor's goal of maintaining uniformity should be deleted altogether. *Id.*

192. Brimer & Bacon, *supra* note 123, at 194.

193. *Id.*

194. Brimer makes a strong argument that it should be against public policy for franchisors to be forced, out of fear of possible liability under the right to control test, to take an effectively hands off approach when it comes to assisting their franchisees to reduce the risk of harm to third parties. *Id.* While this point is well taken, it glosses over the fact that there is no bright line between mere advice, on the one hand, and guidelines and training regimes that might easily appear to some courts to be evidence of an agency relationship. *See* Killion, *supra* note 12, at 165.

195. *See* Miller v. McDonald's Corp., 945 P.2d 1107, 1112 (Or. Ct. App. 1997).

196. *See id.* at 1109; Butler v. McDonald's Corp., 110 F. Supp. 2d 62, 67 (D.R.I. 2000); Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792, 807 (D. Or. 1998); *but see* Kennedy v. Western Sizzlin Corp., 857 So. 2d 71, 78 (Ala. 2003).

197. Killion, *supra* note 12, at 166. This test has become popular especially in Texas. *Id.* (citing Exxon Corp. v. Tidwell, 867 S.W.2d 19 (Tex. 1993)).

198. *See id.*

199. *Id.*

liability.[200]

Underlying this new approach seems to be an assumption that it is unfair to hold franchisors liable for harm which they neither caused nor had a duty to prevent.[201] Arguably, however, vicarious liability never really seems "fair," whether it is applied to a franchisor or any other principal, for it allows a court to pass liability to one who is technically without fault.[202] Yet our body of law has chosen to retain the concept.[203] One strong justification for retaining franchisor vicarious liability lies in the concept of loss distribution.[204] To the extent a franchisor is forced to pay for the transgressions of its franchisees, these costs will ultimately be spread out over the franchisor's whole system.[205] The cost, while potentially significant, has less of a chance of bankrupting any one party, and franchisor cost-sharing increases the chances that the injured party will recover.[206] Moreover, retaining vicarious liability forces franchisors, who benefit monetarily from the activities of their franchisees, to share in some of the burdens when franchisees make poor business decisions.

Professor John L. Hanks has suggested yet another option—one that would discard existing theories of franchisor vicarious liability altogether in favor of a new system that imposes "guarantor status" on franchisors.[207] Under this approach, "plaintiffs would not have a cause of action against a franchisor (assuming the franchisor has not itself been negligent) unless the franchisee was unavailable to be sued or unable to pay a judgment."[208] The most striking benefit for franchisors, of course, is that in most cases they would not be named as co-defendants in suits against their franchisees.[209] As a result, Hanks argues, franchisors would enjoy substantially reduced litigation costs, while third parties injured by franchisees would benefit by still having a back-up source of payment in case the franchisee was insolvent.[210]

There are two problems with this argument. First, it tends to reward

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200. *See id.* The result, of course, is that it would be much more difficult for a party injured by a franchisee to assert a claim against the franchisor. Even if a particular franchisor exercised rather tight control over its franchisee (i.e., control sufficient to justify the finding of an agency relationship under the traditional test) in all areas but the franchisee's employment practices, an employee seeking to recover from the franchisor in a sex discrimination suit would be unable to establish a prima facie case under the new test.

201. *See id.* at 165. Killion argues that franchisees, not franchisors, are in the best position to prevent harm from occurring to third parties and that franchisors simply do not have enough contact with their franchisees to control their behavior.

202. ATIYAH, *supra* note 82, at 13.

203. *See id.* at 19-20.

204. *Id.* at 22.

205. *See id.* at 26.

206. *Id.*

207. Hanks, *supra* note 49, at 8-9.

208. *Id.* at 9.

209. *Id.* at 32.

210. *Id.*

insolvent franchisees by paying their judgments, while it simultaneously punishes financially sound franchisees to the extent that it forces them to bear the full costs of judgments on their own. Second, it seems unlikely that franchisors would realize a dramatic reduction in litigation costs. Although a franchisor might not be officially named a co-defendant, it still would have a vested interest in the outcome of the litigation insofar as a judgment against the franchisee might end up later becoming the franchisor's liability if the franchisee proves to be insolvent.

C. Summary

Arguably, the current state of uncertainty in the case law sends a conflicting message to franchisors. Namely, they are forced to wonder whether the law requires them to take an active, hands-on approach to their relationships with franchisees, or whether such activity is in fact discouraged—a mixed message that is arguably unfair to franchisors. But is it necessary to dispose of franchisor vicarious liability altogether in order to bring some fairness back to the equation? In the next section, this Note suggests that adding an affirmative defense to the existing regime of franchisor vicarious liability would serve as an effective tool for encouraging franchisors to take an active role in addressing the problem of workplace sexual harassment and discrimination.

IV. THE CASE FOR FRANCHISOR VICARIOUS LIABILITY AND THE CREATION OF AN AFFIRMATIVE DEFENSE

A. Introduction

The Supreme Court has stated that "Title VII [was] designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[211] Of these two aims, however, prevention is the primary focus under Title VII,[212] as it should be since the costs of sex discrimination and harassment can be staggering. One study found that employers pay on average between $25,000 to $50,000 to settle sexual harassment claims.[213] In 2004, complaints to the EEOC resulted in the recovery of over $100 million dollars for victims of sex discrimination.[214] Moreover, since the late 1990s, "settlements paid to sexual harassment victims have increased 600 percent . . . ."[215] Employers also face

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211. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

212. Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998).

213. Danielle R. Birdeau et al., *Effects of Educational Strategies on College Students' Identification of Sexual Harassment*, 125 EDUCATION 496, 506 (2005). These figures do not take into account the possibility of occasional but dramatically higher individual judgments and settlements. *See* KATHLEEN NEVILLE, INTERNAL AFFAIRS: THE ABUSE OF POWER, SEXUAL HARASSMENT, AND HYPOCRISY IN THE WORKPLACE 199 (2000).

214. Equal Employment Opportunity Commission, Sex-Based Charges FY 1992—FY 2004, http://www.eeoc.gov/stats/sex.html (last visited July 25, 2006).

215. Birdeau et al., *supra* note 213, at 506.

additional costs relating to negative public perception and decreased investor confidence.[216] Additionally, the victims of sexual harassment and discrimination also pay dearly, as they often suffer serious physical and emotional symptoms and are sometimes even diagnosed with psychiatric disorders.[217] In turn, this often means increased costs for employers due to poorer work performance and decreased workplace morale.[218]

B. Rationale in Support of Liability

Franchised businesses have a significant impact on the economy and employ vast numbers of workers.[219] As a result, franchisors are in a unique position to implement the mandates of Title VII. They have vast distribution channels and have been proven testing grounds for highly successful marketing and business techniques.[220] If franchisor vicarious liability is discarded altogether, as many commentators have suggested it should be, there will be little, if any, incentive for franchisors to take a role in preventing sexual harassment and discrimination within their systems.

At the same time, retaining franchisor vicarious liability without some modification is unfair to franchisors, for no business entity can successfully operate within a legal system that sends mixed messages about what its obligations under the law are to be. In order to send a strong message to franchisors that they should take an active part in preventing sexual harassment and discrimination in the American workplace and that such action will be rewarded, this Note suggests the creation of an affirmative defense to franchisor vicarious liability.

C. The Affirmative Defense

Whether or not one supports franchisor vicarious liability, the fact remains that all of the current factor sensitive approaches serve as disincentives for franchisors to become involved in the implementation of Title VII. The more a franchisor gets involved in the employment practices of its franchisees, the more likely it will be found to have control over such areas.[221] There is no "quick fix"

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216. NEVILLE, *supra* note 213, at 189-90. Such costs can take the form of negative perceptions by both customers and investors. *Id.*

217. SHARYN ANN LENHART, CLINICAL ASPECTS OF SEXUAL HARASSMENT AND GENDER DISCRIMINATION 135 (2004). Physical symptoms range from gastrointestinal disorders and fatigue to back pain and muscle spasms. *Id.* Psychologically, many victims report not only anxiety and feelings of guilt and shame but are also diagnosed with sleep, stress, and depressive disorders. *Id.*; *see also* NEVILLE, *supra* note 213, at 202-07.

218. LENHART, *supra* note 217, at 131. It follows that employers probably also experience higher costs for funding employee health insurance plans when victims seek medical and psychological treatment as a result of workplace harassment and discrimination.

219. ECONOMIC IMPACT, *supra* note 1, at 10.

220. *See* BOROIAN & BOROIAN, *supra* note 7, at 66-67.

221. *See, e.g.*, Miller v. McDonald's Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997).

to the problem of sexual harassment and discrimination,[222] but franchisors can play a vital role in implementing a comprehensive solution to the problem. For this reason, the affirmative defense would relieve franchisors from liability for sexual harassment and discrimination claims if they met a series of bright-line factors.

1. Creation of a System-wide Non-discrimination Policy.—Franchisors have proven themselves to be highly successful business innovators.[223] They develop comprehensive business systems which allow franchisees to realize the dream of small business ownership without "the attendant growing pains" of starting a business from the ground up.[224] It follows, then, that a franchisor is in a unique position to design and implement a highly effective non-discrimination policy which would be tailored to the uniform needs of the franchisees within its system. Such a policy should be a written statement of the particular franchise system's stance against workplace sexual harassment and discrimination[225] and should be uniformly adopted by the franchisor and all of its franchisees. The policy should clearly describe what constitutes sexual harassment and discrimination, how an employee should make a report, and what actions the franchisee and franchisor will take to investigate and correct the problem.[226]

2. Training for Franchisees and Their Supervising Employees.—A policy statement alone likely would be insufficient to combat the problem, but at least one study has found that adding a training component can be an effective way to *prevent* sexual harassment and discrimination from occurring in the first place.[227] Most franchisors already require their franchisees to attend some form of training prior to operating a franchised location,[228] and sexual harassment and discrimination training would be a natural addition. In effect, this approach would save franchisees the expense of single-handedly creating and implementing their own training programs by allowing them to pool their resources, much like they already do with marketing expenses. That said, however, the creation of a comprehensive sexual harassment and discrimination policy and the implementation of a training regime alone are likely not enough. For instance, one study suggests that subordinates are more likely to report when there is an alternative reporting channel "outside of the normal chain of

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222. NEVILLE, *supra* note 213, at 160.

223. *See* DICKE, *supra* note 2, at 1.

224. BOROIAN & BOROIAN, *supra* note 7, at 17.

225. NEVILLE, *supra* note 213, at 219; *see also* Equal Employment Opportunity Commission, Model EEO Programs Must Have an Effective Anti-Harassment Program, http://www.eeoc.gov/federal/harass/index.html (last visited July 25, 2006).

226. *Id.*

227. *See, e.g.*, Birdeau et al., *supra* note 213, at 504, 508.

228. Even after the franchisee has started his or her franchise location, franchisors often provide ongoing support and training. For instance, McDonald's operates "Hamburger University" in Oakbrook, Illinois, for the purpose of training both its own as well as its franchisees' employees. *See* McDonald's Corp., Hamburger University Homepage, http://www.mcdonalds.com/corp/career/hamburger_university.html (last visited July 25, 2006).

command."[229]

3. Creation of an Alternative Reporting and Investigative Channel.—In order to address the problem, franchisors and franchisees need to know that it exists.[230] However, employees are less likely to report harassment or discrimination if they do not feel safe telling their direct supervisor.[231] In the franchising context, this would be especially true where the franchisee himself or herself was responsible for the discrimination or harassment. In such a situation, franchisors are especially well suited to serve as an alternative reporting and investigation channel. The affirmative defense would require that franchisors create some form of centralized call center to handle incoming complaints from employees who felt unsafe reporting directly to their franchisee. Moreover, the call center would initiate a franchisor-led investigation of such complaints.

4. Clear Notice to all Employees Within the Franchisor's System.—Every employee in the franchise system must be aware of the uniform policy and of the existence of the alternative reporting and investigative channel.[232] This would be accomplished by requiring that information be posted in every location which both clearly describes the non-discrimination policy and informs employees of the call center maintained by the franchisor. Such a poster should be similar to those which inform employees of minimum wage requirements.

5. Financial Responsibility and Insurance Requirements.—Finally, in most cases, a franchisee's general liability insurance policy will not cover claims for sexual harassment and discrimination.[233] For this reason, a franchisor should require in the franchise agreement that its franchisees maintain adequate "employment practices liability insurance," which is specifically designed to cover employee claims of sexual harassment.[234] To ensure that franchisees maintain adequate coverage, franchisors should periodically request proof of insurance from the franchisee. Moreover, the franchise agreement should contain a provision that allows the franchisor to terminate the relationship if a franchisee is unwilling or unable to maintain an adequate policy.

D. Implementing the Affirmative Defense

On occasion, the Supreme Court has shown a willingness to expand the meaning of Title VII. For instance, in the landmark case of *Meritor Savings*

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229. Juanita M. Firestone & Richard J. Harris, *Perceptions of Effectiveness of Responses to Sexual Harassment in the US Military, 1988 and 1995*, 10 GENDER, WORK & ORG. 42, 58-59 (2003).

230. NEVILLE, *supra* note 213, at 94.

231. *See* Firestone & Harris, *supra* note 229, at 58.

232. Birdeau et al., *supra* note 213, at 506.

233. Ed. E. Duncan, *Insurance Coverage for Sexual Harassment in the Workplace*, 51-2 PRAC. LAW 51, 63 (2005).

234. *Id.* at 60. Such policies might also include coverage for claims made by applicants for employment or other third parties, such as customers. *Id.*

Bank v. Vinson,[235] the Court recognized for the first time that sexual harassment which creates a hostile work environment is an actionable form of sex discrimination, even though the language of Title VII does not explicitly refer to sexual harassment.[236] Subsequently, in the companion cases of *Burlington Industries, Inc. v. Ellerth*[237] and *Faragher v. City of Boca Raton*,[238] the Court held that employers are subject to vicarious liability when a supervisor creates a hostile work environment through sexual harassment of a subordinate employee.[239] At the same time, however, the Court created an affirmative defense[240] for employers, which allows them to avoid such vicarious liability when the following conditions are met: (1) no tangible employment action[241] against the employee has occurred; (2) the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior;"[242] and (3) the "employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[243]

Likewise, the affirmative defense proposed here would allow franchisors to avoid vicarious liability for sex discrimination and harassment claims made by employees against franchisees. Much like the *Ellerth/Faragher* defense, it would "recognize the [franchisor's] affirmative obligation to prevent violations and give credit . . . to [franchisors] who make reasonable efforts to discharge their duty."[244] One obvious problem with relying on the judicial creation of an affirmative defense, however, is that franchisors would not be on notice, and thus they would not begin implementing the preventative practices recommended above until the Supreme Court had the opportunity to hear a case involving this matter.

Perhaps, then, there is a better approach. This Note suggests that there are at least two. First, Congress could amend Title VII to explicitly include

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235. 477 U.S. 57 (1986).

236. *Id.* at 66-67. The Court noted that this had long been the position of the EEOC and various courts of appeal. *Id.*

237. 524 U.S. 742 (1998).

238. 524 U.S. 775 (1998).

239. *Ellerth*, 524 U.S. at 765.

240. This Note does not propose an extension of the *Ellerth/Faragher* defense to franchisors. Rather, the *Ellerth/Faragher* defense is mentioned because it serves as an example of the Supreme Court's willingness to shield employers from sexual harassment liability when certain conditions are met.

241. A tangible employment action includes, for instance, being terminated, demoted, or denied a raise or promotion. *Ellerth*, 524 U.S. at 761. If a tangible employment action occurs, then the *Ellerth/Faragher* affirmative defense is not available to the employer. *Faragher*, 524 U.S. at 808. The franchisor affirmative defense proposed here would differ from *Ellerth/Faragher* in that it would be available to franchisors even when a tangible employment action occurred.

242. *Ellerth*, 524 U.S. at 765.

243. *Id.*

244. *Faragher*, 524 U.S. at 806.

franchisors within the definition of the term employer.[245] Under this approach, Congress would also create a statutory affirmative defense similar to the one suggested above in Part IV.C. In the alternative, the EEOC, which already creates regulations and guidance documents for the implementation of Title VII, could take on the role of creating the affirmative defense.[246]

Action by Congress or the EEOC has two primary benefits. First, it would allow for a comprehensive study of the issue. Arguably, there are many questions which remain to be answered. For instance, should all franchisors be subject to vicarious liability and the affirmative defense, or should franchisors with only a few locations be exempt? And, are there other elements that should be included in the affirmative defense? Second, and perhaps more importantly, it would give franchisors prospective notice of the affirmative defense and allow them to begin taking an active role in addressing the problem of workplace sexual harassment and discrimination sooner rather than later.

CONCLUSION

Franchising has revolutionized the way the United States does business.[247] As a group, franchised businesses now employ significant numbers of workers and generate considerable economic activity. Unfortunately, the problem of sexual harassment and discrimination has also become an increasingly recognized phenomenon in the modern American workplace. This Note advocates that franchisors stand in a unique position to bring about yet another business revolution by taking an active role in the sexual harassment and discrimination policies of their franchisees.

Under the approach advocated here, franchisor vicarious liability would be retained as it recognizes that franchisors often exercise sufficient control over their franchisees to justify holding them responsible when their franchisees discriminate on the basis of sex. By the same token, the creation of an affirmative defense would allow franchisors to use their unique positions of control to influence the sexual harassment and discrimination policies and practices of their franchisees without fearing that such action will ultimately increase their chances of being held liable. Giving responsible and active franchisors a shield from liability represents a positive step towards shielding the nation's workers from workplace sexual harassment and discrimination.

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245. Title VII's definition of the term employer is found at 42 U.S.C. § 2000e(b) (2000).

246. *See, e.g.*, 42 U.S.C. 2000e-4(g)(5), which states that the EEOC is empowered "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public."

247. McDonald's Corp. stands as a vivid example. The company, which started a mere fifty years ago as a hamburger stand, now has more than 30,000 locations and is the world's largest owner of real estate. McDonald's Investor Fact Sheet, http://www.mcdonalds.com/corp/invest/pub/2006_fact_sheet.html (last visited July 25, 2006); BOROIAN & BOROIAN, *supra* note 7, at 27.